Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-63

JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina, who are sued in their official capacity only

Appellants

vs.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, A Washington State Agency

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, James E. Holshouser, Governor of the State of North Carolina; Rufus L. Edminsten, Attorney General of the State of North Carolina; James A. Graham, Commissioner of Agriculture of the State of North Carolina, appellants, file this statement of the basis on which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and that the Court should exercise such jurisdiction in this case.

OPINION BELOW

The opinion of the three-judge district court appears in 408 F. Supp. 857 (E.D.N.C. 1976) and is included herein as Appendix A, (pp 8-18).

JURISDICTION

The appeal herein is from a final judgment made and entered in the United States District Court for the Eastern District of North Carolina by a specially constituted three-judge panel convened under 28 U.S.C. §§2281 and 2284. The judgment enjoins the enforcement of a state statute. The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 USC §1253.

The final judgment was entered April 22, 1976. Notice of Appeal was filed on May 20, 1976, in the United States District Court for the Eastern District of North Carolina.

STATUTE INVOLVED

The General Statutes of North Carolina §106-189.1, as amended by Chapter 506 of the Session Laws of 1973, provide:

> (a) All apples sold, offered for sale, or shipped into this state in closed containers shall bear on the con-

tainer, bag or other receptable no grade other than the applicable U.S. grade or standard or the marking "unclassified", "not graded" or grade not determined."

(b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than Fifty Dollars ($50.00). Each day on which the apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

QUESTIONS PRESENTED

1. Did the court below err in refusing to dismiss the action because the Washington State Apple Advertising Commission lacked standing to bring the action?

2. Did the court below err in refusing to dismiss the action because the jurisdictional amount requirement of 28 U.S.C. §1331 was not met?

3. Did the court below err in declaring N. C. Gen. Stat. §106-189.1 unconstitutional as imposing an impermissible burden on interstate commerce and in enjoining the enforcement of the statute insofar as it precluded the display of the Washington State grade on closed containers of apples shipped into the State of North Carolina?

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

N.C. Gen. Stat. §106-189.1 was duly enacted into law by the General Assembly of North Carolina. The statute is a part of the North Carolina Marketing and Branding Farm Products Law, and it requires that "no grade other than the applicable U.S. grade" be shown on closed containers of apples sold, offered for sale, or shipped into North Carolina.

The Washington State Apple Advertising Commission filed suit requesting a declaratory judgment that the statute

was unconstitutional and requesting that enforcement of the statute be permanently enjoined.

The District Court overruled appellant's motion to dismiss on the ground that the jurisdictional amount requirement of 28 U.S.C. §1331 was not met and that the Washington State Advertising Commission lacked standing to challenge the statute. After a hearing on the merits, the District Court held that the statute contravened the Commerce Clause of the United States Constitution, and it enjoined enforcement of the statute insofar as it precluded the display of the Washington State grade on closed containers of apples shipped into North Carolina.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions in that:

A. The Washington State Apple Advertising Agency (hereinafter "Commission") was allowed to maintain the suit despite the fact that the Commission had no "personal stake" in the outcome of the litigation. The Commission is a Washington State agency charged with promoting and expanding the market for Washington-grown apples. It is not an association of apple growers or shippers. Since it neither grows nor sells apples, nor represents those who do, it lacked standing to maintain the suit.

B. The Commission was allowed to maintain the suit despite its failure to meet the jurisdictional amount requirement of 28 U.S.C. §1331. For the court to have jurisdiction under 28 U.S.C. §1331, the amount in controversy must exceed the sum of $10,000.00. Perusal of the Commission's pleadings indicates that it could not possibly establish that it has lost one single dollar because of the challenged statute, or that it was threatened with loss. The Commission's allegations were that individuals other than the Commission have suffered loss, or would suffer loss in the future. Its own

pleadings revealed that the court could not properly exercise jurisdiction over the controversy.

C. The District Court decision contravenes Supreme Court decisions upholding the right of each state to exercise broad powers in the area of regulating the inspection, branding, and packaging of farm products grown, produced, or marketed within the state. When the health, safety, and welfare of local residents are being protected through a reasonable exercise of a state's police power, there is a strong presumption that the challenged statute is constitutional. Thus, despite the fact that interstate commerce was affected or burdened to some extent, the Supreme Court has upheld state regulations pertaining to food where the chief purpose or effect was to protect local purchasers of food from fraud or deception, or from misbranding, or from unwholesome, impure, or injurious food. The District Court, in striking down N.C. Gen. Stat. §106-189.1, failed to consider, or failed to follow, the case law in this area.

D. The District Court decision ignored United States Department of Agriculture recommendations that uniformity in grading nomenclature be promoted in the grading of food items. One recommendation of a United States Department of Agriculture team study conducted in 1972 was that state apple grades be eliminated to "lessen confusion in trading." The study noted that, at that time, 13 states had their own apple grades and standards, but that only Washington was using its grades extensively. It noted that variations in certain requirements lead to confusion in trading, and it said *"Elimination of State grades and adoption of U. S. grades would lessen confusion at the wholesale and retail levels."* (Emphasis added.) This was not a study done by a state agency to support protective legislation; it was a study done nationally by a group of impartial experts. Its recommendations indicate that, in the area of apple grading standards, it is the State of Washington that is out of step with the rest of the nation, not the contrary.

The move toward uniformity in grading standards is a necessity when viewed in the larger context. The United States Department of Agriculture has proposed establishing a uniform grading nomenclature for U. S. grades for fresh fruits, vegetables, nuts and other special products. In its proposal the Department notes that "there are 152 grade standards covering 82 fresh fruits and vegetables" and that there are "at least four different terms to describe the top grade" for those 82 fresh fruits, vegetables, nuts and other special products. After adding to this multitude of U. S. grades the various and sundry state grading variations, it is readily apparent that the opportunity for confusion, even among wholesalers and traders, is clear and abundant. To attempt to reduce the opportunities for confusion by the evenhanded regulation of grading standards would appear to be a legitimate exercise of a state's police power.

E. The District Court's decision disrupted North Carolina's efforts to exercise reasonable control over the branding of apples shipped into or sold within the state in closed containers. North Carolina legislated in an evenhanded manner in regulating the branding of apples. The statute imposed the same uniform requirement on all apples, including all North Carolina grown apples offered for sale in closed containers. A large number of states ship apples in interstate commerce, and of those states, a considerable number have their own state grading standards. Among the states having grading standards, there is no uniformity in grading standards but they use the same indicative terms (*E.g.*, Extra Fancy, Fancy, etc.). Washington State is only one of many states which ship apples into North Carolina. The Washington apple grading standards can be changed without legislative action and could be manipulated according to market conditions. Invalidation of N. C. Gen. Stat §106-189.1 has

opened the way to *all* apple marketing states to ship their apples into North Carolina using misleading, deceptive, and inferior state grades.

CONCLUSION

For the reasons stated above, appellants submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

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APPENDIX A

IN THE UNITED STATES DISTRIT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

THREE-JUDGE COURT

No. 75-0300-CIV-5

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION
A Washington State Agency,

Plaintiff,

versus

JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina, who are sued in their official capacity only,

Defendants.

MEMORANDUM DECISION

(Heard February 6, 1976 Decided March 1, 1976)

Before CRAVEN, Circuit Judge, LARKINS, Chief District Judge and DUPREE, District Judge.

Slade Gorton, Attorney General for State of Washington, Olympia, Washington, James Arneil, Special Assistant Attorney General for State of Washington (Davis, Arneil, Dorsey & Kight, Wenatchee, Washington), Robert C. Howison, Jr., Special Assistant Attorney General for State of Washington (Joyner & Howison, Raleigh, North Carolina) for Plaintiff; Rufus L. Edmisten, Attorney General of North Carolina, Millard R. Rich, Jr., Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, and Joseph E. Wall and John R. Jordan, Jr. (Jordan, Morris & Hoke, Raleigh, North Carolina) for Defendants.

CRAVEN, Circuit Judge:

The Washington State Apple Advertising Commission challenges the constitutionality of N.C. Gen. Stat. § 106-189.1, which requires that "no grade other than the applicable U.S. grade" be shown on closed containers in which apples are "sold, offered for sale or shipped into" North Carolina.[1] The Commission argues that this statute violates the commerce clause, the equal protection and due process guarantees, and the first amendment to the United States Constitution. In oral argument plaintiff pressed but two of these claims—that the statute constitutes an unreasonable burden and restriction upon interstate commerce in violation of art. 1, § 8 of the Constitution, and that, by prohibiting the display of the Washington state grade, the statute violates the constitutional right of freedom of speech. We agree that the statute violates the commerce clause, and, accordingly, declare it unconstitutional and enjoin its enforcement as applied to state grade markings on closed containers. Our determination of that issue makes it unnecessary to examine the Commission's other objections to the law.[2]

---

[1] The General Statutes of North Carolina § 106-189.1, as amended by Chapter 506 of the Session Laws of 1973, provide:

> (a) All apples sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U.S. grade or standard or the marking "unclassified", "not graded" or "grade not determined."
>
> (b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than Fifty Dollars ($50.00). Each day on which the apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

[2] As to whether the communication of information implicit in the Washington state grades is afforded some protection by the first amendment even though "commercial speech," *see:* Bigelow v. Virginia, 421 U.S. 809, 818-26 (1975); Terminal-Hudson Electronics, Inc. v. Department of Consumer Affairs, 44 U.S.L.W. 2337 (C.D. Cal. Jan. 6, 1976) (three-judge court); Anderson Clayton & Co. v. Washington State Dept. of Agriculture, 402 F. Supp. 1253 (W.D. Wash. 1975) (three-judge court).

I.

This action for declaratory and injunctive relief was brought by the Washington State Advertising Commission, an agency and corporate body created by legislative act of the State of Washington. On motion to dismiss, Judge Dupree, sitting alone,[3] held that the Commission had standing to "assert all the claims presented in the complaint, both those interests clearly belonging to the Association itself and those belonging to the various individual growers and producers of the State of Washington [and] . . . that there exists the necessary amount in controversy." We agree, and proceed to the merits.[4]

II.

We find the essential facts to be as follows:

1. N.C. Gen. Stat. § 106-189.1 (1973) requires that all apples "sold, offered for sale, or shipped into [North Carolina] in closed containers" shall bear "no grade other than the applicable U.S. grade or standard or the marking 'unclassified,' 'not graded' or 'grade not determined.'" Violations of the statute are punishable by a criminal penalty in the amount of up to $50.

2. No such statute applies to any other type of produce or to apples shipped in open containers.

3. North Carolina is the only state in the nation which prohibits the display of Washington state grades on closed shipping containers.

4. In 1974, the last year for which figures are available, Washington apple growers shipped apples worth in excess

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[3] It is clear that a single district judge has jurisdiction to hear a motion to dismiss based on these grounds. Gonzalez v. Employees Credit Union, 419 U.S. 90, 100 (1974); Jacobs v. Tawes, 250 F.2d 611 (4th Cir. 1957).

[4] Since there is jurisdiction under 28 U.S.C. § 1331, we need not consider whether there is also jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

of $2,000,000 directly into North Carolina. Additionally, apples worth approximately 30 to 40 percent of that amount were trans-shipped into North Carolina after direct shipment to other states.

5. The Commission spent in excess of $25,000 in advertising for the 1974 crop year. North Carolina has no statute or regulation which prohibits such advertising other than that involved in the grading statute under challenge in this case.

6. The State of Washington requires that all apples shipped in closed containers which are packed in the State must be graded according to either Washington State apple grade or the U.S. grade.

7. Presently 13 states have state grades. Of these, seven states, including Washington, currently ship apples into North Carolina.

8. At the time N.C. Gen. Stat. § 106-189.1 was enacted, North Carolina had no state apple grade.

9. As of September 1, 1974, the Washington State apple grades were made equivalent or superior to U.S. grades in all corresponding categories. These grades are established by Washington Department of Agriculture regulations.

10. As a direct result of the enactment of N.C. Gen. Stat. § 106-189.1, some apple growers in the State of Washington have taken the following actions:

a. Washington state grades have been manually obliterated from closed shipping boxes to be shipped to North Carolina at a cost of five to 15 cents per box;
b. Preprinting of shipping boxes with state grades have been abandoned and the applicable U.S. grade stamped manually or mechanically on boxes;
c. Accounts in North Carolina have been cancelled, and sales to the state curtailed. (Some individuals have abandoned marketing in the state entirely.)

These results of the legislation constitute a burden on interstate commerce.

11. The existence of multiple, inconsistent state grades pose a danger of confusion in the apple marketing industry. There is, however, no showing that Washington state grades have caused any confusion.

12. The stated purpose of the North Carolina apple grading statute is to "standardize grading labels, reduce confusion, and prevent deception" in the marketing of apples in the state. Brief for Defendant at 13.

13. The purchase of apples in closed shipping containers is normally and generally done only by wholesale produce brokers and distributors or by the produce buyers for food stores and supermarkets. Apples are not generally sold at retail to the public in their shipping containers.

III.

The State of North Carolina argues that the statute is a valid exercise of police power and, as such, is not unconstitutional under the commerce clause. It contends that the purpose of the legislation is to eliminate "confusion and deception in the marketing of foodstuffs" which results from the proliferation of multiple inconsistent and non-uniform state grades. This interest, North Carolina argues, is a valid local concern under the state's police powers, "akin to . . . regulations protecting the health and welfare of the State's citizens." Brief for Defendant at 5. *See Florida Lime and Avacado Growers, Inc. v. Paul,* 373 U.S. 132, 146 (1963). Furthermore, the state notes the statute is nondiscriminatory on its face; it applies to all apples moving in commerce in the state regardless of their point of origin inside or outside the state.

Given these basic propositions, North Carolina argues that no balancing of local benefit against the burden on interstate commerce is required:

> If the legislation is a reasonable means of achieving a non-discriminatory, legitimate goal it is constitutional.

> When protection of the health, safety and welfare of the citizenry is the purpose for enacting such legislation, "public policy" questions of whether the benefits outweigh the costs of compliance are questions properly determined by the state legislature.

Brief for Defendant at 8-9.

We believe that the labels the state attempts to pin on this statute are not conclusive as to its constitutionality. North Carolina's first major point in support of the statute's validity is that it is nondiscriminatory, applying alike to apples moving in commerce in the state whether produced inside or outside the state. That this is facially correct does not afford a basis for decision.

In *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), the Supreme Court struck down as discriminating against interstate commerce a North Carolina tax of $250 "on every person or corporation, not a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders." In reaching this result, the Court stated:

> *The commerce clause forbids discrimination, whether forthright or ingenious.* In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.
>
> This standard we think condemns the tax at bar. *Nominally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or nonresidents. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants.* The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. . . . The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of $1 per annum for the privilege of doing business.

> Non-residents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this $250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be.

Id. at 455-56 (emphasis added and footnotes omitted).

Similarly, in *Minnesota v. Barber*, 136 U.S. 313 (1890), the Court struck down a facially neutral statute which required that animals must be inspected in the state before slaughter if fresh meat from them was to be sold there. The Court dealt with the discriminatory impact of the statute as follows:

> It is, however, contended in behalf of the State, that there is in fact no interference, by this Statute, with the bringing of cattle, sheep and swine into Minnesota from other States, nor any discrimination against the products or business of other States, for the reason—such is the argument—that the Statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling, or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States. *To this we answer that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.*

Id. at 326 (emphasis added).

Despite facial neutrality, it is clear that the statute discriminates against interstate apple sales and in favor of those intrastate in nature. At the time the statute was enacted, North Carolina had and up to the present has no established grading system. Washington did. The statute, as a result, has had no effect on the existing practices of North Carolina

apple producers; they may market their apples with no grade whatsoever, or they may affix the United States grade. But Washington apple producers, wishing to sell in North Carolina, have been forced to change their practices with a resulting burden on interstate commerce.[5]

While we do not know and cannot here determine whether the "true" legislative purpose of this statute was to discriminate, we conclude that its effect is discriminatory. "[O]ne state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). The North Carolina statute in this case represents a substantial step in that forbidden direction.

North Carolina also argues that since this legislation represents an exercise of the state's police power over a matter of legitimate local concern, confusing and deceptive marketing practices, it is constitutional irrespective of this court's view of the determinations of "public policy" on which it was based.[6] The Supreme Court has clearly stated that safety measures, to which this statute bears resemblance, "carry a strong presumption of validity when challenged in court." *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524

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[5] *See* Findings of Fact 10, *supra*.

[6] In some formulations of its arguments the state seems to carve out regulation of foodstuffs and the elimination of confusion and deception in the marketing of foodstuffs as a class of health, safety and welfare regulations where the state's interests are dominant no matter what the burden on interstate commerce: "Defendants contend that a balancing of local benefit against the burden on interstate commerce is not a required part of the Supreme Court's test where the legislation in question regulates the readying of foodstuffs for market." Brief for defendant at 6. North Carolina cites no case which so holds, and we are convinced that is not the law.

We believe the test in all areas is that articulated in Pike v. Bruce Church, 397 U.S. 137, 142 (1970), which is in essence a balancing test. It is true that the traditionally strong interest of states in the regulation of foodstuffs as a health measure often outweigh the burden on interstate commerce. But where the state regulation prevails it is because of the strength of its interest, and not the distinctive nature of the judicial test applied to this discrete area of interest.

(1959). Furthermore, "[i]f there are alternative ways of solving a problem, [the Court does] not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field." *Id.* (footnote omitted). But it is clear that the Court did not mean that because a state acts under its police power with respect to health and safety the legislation is withdrawn from scrutiny under the commerce clause.

In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court rejected the same argument. "[T]hat the ordinance is valid simply because it professes to be a health measure . . . would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Id.* at 354.

But even a statute with some discriminatory impact may be sustained if the local interests are sufficiently strong[7] and the statute carefully tailored to their protection.[8] Here, however, the statute's purported purpose of eliminating deception and confusion in the marketing of apples is irrationally implemented. Apples may *not* be marketed in the state in closed containers bearing (1) a state grade only, (2) the U.S. grade *and* a state grade, but they may be marketed (3) *with no grade at all*. Certainly this regulation does not eliminate the multiplicity of differing state grades, but it does so in favor of *no information at all*. Moreover, the statute concerns itself only with the marketing of apples in closed containers, which rarely, if ever, reach the consuming public. It is typically the wholesaler who sees these grade markings, and we do not believe that, as to him, the goal of eliminating confusion and deception would be better served by no grade than by the state grades.

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[7] *Cf.* Union Brokerage Co. v. Jensen, 322 U.S. 202, 211 (1944).

[8] *See Dean Milk, supra* at 354.

IV.

For the foregoing reasons, we conclude that N.C. Gen. Stat. § 106-189.1 has the effect of discriminating against interstate commerce by burdening the sale of Washington apples for the benefit of local producers.[9]

Accordingly, we declare N.C. Gen. Stat. § 106-189.1 unconstitutional insofar as it prohibits the display of the Washington State apple grade on closed containers shipped directly or indirectly into this state, and we will enter a judgment to enjoin its enforcement.

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[9] Even had we found the statute to have been neutral in its impact, we believe it would be unconstitutional as violative of the commerce clause. Pike v. Bruce Church, 397 U.S. 137, 142 (1970), stated the basic test of constitutional validity interstate commerce as follows:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

(Citation omitted).

North Carolina contends that it should prevail under this test since the interference with commerce is minimal. We disagree. An extra cost of 5-15 cents per box is enough to cause some wholesalers to abandon the market. "[T]he burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." Thus, even absent discriminatory effect, the statute would still be invalid.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

THREE-JUDGE COURT

(Judgment entered April 22, 1976)

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, a Washington State Agency, Plaintiff,	CIVIL ACTION FILE NO. 75-0300-Civ-5
vs.	
JAMES E. HOLSHOUSER, JR., Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina, who are sued in their official capacity only, Defendants.	JUDGEMENT DECLARING N. C. GEN. STAT. §106-189.1 UNCONSTITUTIONAL AND ENJOINING THE ENFORCEMENT THEREOF AGAINST DISPLAY OF WASHINGTON STATE APPLE GRADES ON CLOSED CONTAINERS

THIS CAUSE coming on to be heard and being heard on the merits before the undersigned J. Braxton Craven, Circuit Judge, John D. Larkins, Jr., Chief District Judge, and Franklin T. Dupree, Jr., District Judge, on February 6, 1976, it having been ordered on October 14, 1975, by Judge Dupree that the action required the convening of a three-judge court pursuant to 28 U.S.C. §2281, upon Plaintiff's Complaint asking the Court to declare N. C. Gen. Stat. §106-189.1 (1973) in violation of the United States Constitution insofar as said statute prohibits the display of the Washington State apple grade on closed containers shipped directly or indirectly into North Carolina and seeking to enjoin the enforcement of said statute as it applies to the aforementioned activities; and

The plaintiff being represented by Slade Gorton, Attorney General for the State of Washington, Olympia, Washington, Edward B. Mackie, Deputy Attorney General for the State

of Washington, Olympia, Washington, James Arneil, Special Assistant Attorney General for the State of Washington (Davis, Arneil, Dorsey, Kight & Parlette, Wenatchee, Washington), Robert C. Howison, Jr., Special Assistant Attorney General for the State of Washington and Edward S. Finley, Jr. (Joyner & Howison, Raleigh, North Carolina), and defendants being represented by Rufus L. Edmisten, Attorney General of North Carolina, Millard R. Rich, Jr., Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, and Joseph E. Wall and John R. Jordan, Jr. (Jordan, Morris & Hoke, Raleigh, North Carolina); and

The Court having considered the affidavits filed herein and arguments of counsel and being fully advised in the premises, and having heretofore filed its Memorandum Decision March 1, 1976, the findings and holdings of which are incorporated herein; and

It appearing to the Court that Plaintiff has standing to assert all the claims presented in the Complaint, both those interests clearly belonging to the Plaintiff itself and those belonging to the various individual growers and producers of the State of Washington and that there exists the necessary amount in controversy; and

It appearing to the Court that N. C. Gen. Stat. §106-189.1 has the effect of discriminating against interstate commerce by burdening the sale of Washington apples for the benefit of local producers and therefore constitutes an unreasonable burden and restriction upon interstate commerce in violation of Art. 1, §8 of the United States Constitution;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that N. C. Gen. Stat. §106-189.1 is in violation of Art. 1, §8 of the United States Constitution insofar as it prohibits the display of the Washington State apple grade on closed containers shipped directly or indirectly into North Carolina; and

IT IS FURTHER ORDERED, ADJUDGED AND

DECREED that the Defendants, and each of them, are hereby permanently enjoined from enforcing N. C. Gen. Stat. §106-189.1, or any regulations thereunder, insofar as said statute, or regulations thereunder prohibit the display of the Washington State apple grade on closed containers shipped directly or indirectly into North Carolina, and that Plaintiff shall recover its costs.

DONE IN OPEN COURT this 19 day of April, 1976.

J. Braxton Craven
United States Court of Appeals Judge
Fourth Judicial Circuit

John D. Larkins, Jr.
Chief United States District Judge

F. T. Dupree, Jr.
United States District Judge

Presented by:

Slade Gorton
James Arneil
R. C. Howison, Jr.
of Attorneys for Plaintiff

Approved as to form:

Millard R. Rich, Jr.
John R. Jordan, Jr.
Joseph E. Wall
of Attorneys for Defendants

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, A Washington State Agency

Plaintiff

vs.

JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina who are sued in their official capacity only,

Defendants

CIVIL ACTION FILE
No. 75-0300-CIV-5

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed May 20, 1976)

NOTICE is hereby given that James E. Holshouser, Jr., Governor of the State of North Carolina; Rufus L. Edmisten, Attorney General of the State of North Carolina; and James A. Graham, Commissioner of Agriculture of the State of North Carolina, the defendants above-named, hereby appeal to the Supreme Court of the United States from the final judgment declaring N. C. G. S. §106-189.1 unconstitutional and enjoining enforcement thereof entered in this action on 22 April 1976.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Date: 20 May, 1976.

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NORTH CAROLINA

WAKE COUNTY

AFFIDAVIT

I, Joseph E. Wall, depose and say that I am an attorney in the office of John R. Jordan, Jr., attorney of record for James E. Holshouser, Rufus Edmisten and Jim Graham, the appellants herein, and that, pursuant to Rule 33, Rules of the Supreme Court I served three copies of the attached Notice of Appeal on the party required to be served herein, as follows:

On The Washington State Advertising Commission, the appellee herein, by delivering the same to Edward S. Finley, Jr., attorney in the office of Robert C. Howison, Jr., counsel of record for The Washington State Advertising Commission, located in the Wachovia Bank Building, Raleigh, North Carolina on May 20, 1976.

All parties required to be served have been served.

JOSEPH E. WALL

Subscribed and sworn to before me on 20 May, 1976.

MAUREEN H. O'DANIEL
Notary Public

My commission expires:

Aug. 22, 1975

Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-63

JAMES E. HOLSHOUSER, Governor of the State of North Carolina, ET AL.
Appellants

vs.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, A Washington State Agency

---

On Appeal from the United States District Court for the Eastern District of North Carolina

---

Jurisdictional Statement Filed July 16, 1976
Probable Jurisdiction Postponed October 4, 1976

Commercial Printing Co., Raleigh, N. C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, A Washington State Agency Plaintiff vs. JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina who are sued in their official capacity only Defendants	Civil Actior File No. 75-0300-Civ-5

DOCKET ENTRIES

Date	Proceedings
1975	
Sept. 19	Fil. & ent. Complaint — Plff. prays: Three-judge court be convened; That court that [sic] N. C. G.S. 106-189.1 violates Art. I, Sec. 8 of the U. S. Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the U. S.; that said statute violates the equal protection clause of the 14th Amend. by providing that apples be treated differently from other fresh fruit, etc., shipped in open containers; that said statute violates due process clause of 14th Amend.; that said statute infringes upon the right of free speech, and the right of

buyers to know and use said grade, all as guaranteed by the 1st. Amend. of U. S. Constitution as incorporated into the due process clause of the 14th Amend. of U. S. Constitution.; that this cause be advanced for early hearing & court issue prelim. inj. after notice restraining & enjoining defts. from enforcing N.C. G.S. §106-189.1, to the extent the same applies to sale, offer for sale or shipment of Wash. State apples in closed containers, and that this prelim. inj. be effective against any persons, pending the hearing and determination of the cause; that upon hearing, the inj. be made permanent. Foregoing prayer to apply to First & Second Cause of Action in Complaint. Plff. further prays that its costs and other relief be granted as court deems just.

Oct. 2	Fil. and ent. U.S. Marshal's Returns on Summons &.Complaint . . .
Oct. 7	Fil. and ent. Motion to Dismiss by defts. w/CS.
Oct. 14	Fil. and ent. Order Certifying Pendency of Action Requiring Three-Judge Court . . .
Oct. 20	Fil. and ent. Designation of Three-Judge Court . . .
Nov. 26	Notice of Hearing . . .
Dec. 5	Fil. and ent. Stipulation to Amend Complaint and First Amended Complaint . . . . .
Dec. 31	Fil. and ent. Memorandum Order that defts'. motion to dismiss is denied . . .

1976

Jan. 9	Notice of Pre-Trial Conference . . .
Jan. 13	Fil. and ent. Answer of defts . . . . .
Jan. 23	Fil. and ent. Final Pre-Trial Order . . .
Jan. 26	Fil. and ent. affidavits of C. W. Schulke, Gillis Coleman, Thomas R. Morris, Donald Ford, Avery Womble, Joe McGee, J. L. Morgan, John C. Taylor, Arlis E. Vernon, and W. L. Kyle . . . . .
Jan. 29	Fil. and ent. Affidavits of Herbert L. Frank, Dick Shumway, Frank Coleman, Richard R. Larsen, Clayton Udell, Robert Scea and Bill Hartmann . . .
Feb. 2	Fil. and ent. Supplemental Affidavit of C. W. Schulke . . .
	Fil. and ent. Affidavit of Harold Cozart . . .
	Fil. and ent. Affidavits of Richard N. Barber, Charles Murray, Charles Elks, Curtis Tarleton, and Lynwood Davenport . . .
Feb. 3	Fil. and ent. Affidavits of Everett Lutz and Boyce Enloe . . .
Feb. 4	Fil. and ent. Affidavit of Perry Lowe, Jr. . . .
Feb. 5	Fil. and ent. Affidavits of Joseph T. Brownlow and Lew Sterling . . .
	Fil. and ent. Supplemental Affidavit of C. W. Schulke Controverting Affidavits of Defendants . . .

Feb. 6	Three-Judge Court Hearing in Raleigh — 1 hr. 10 min. (Craven, Larkins & Dupree)
Mar. 1	Fil. and ent. Memorandum Decision . . .
	Fil. and ent. Judgment declaring N. C. Gen. Stat. §106-189.1 unconstitutional and enjoining the enforcement thereof against display of Washington State Apple grades on closed containers . . .
May 20	Fil. and ent. Notice of Appeal to the Supreme Court of the United States by defts. w/CS
Sept. 16	Original case file mailed to Supreme Court of U. S., pursuant to phone request today.

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

COMPLAINT TO DECLARE SECTION 189.1 OF CHAPTER 106 OF THE NORTH CAROLINA GENERAL STATUTES UNCONSTITUTIONAL AND ENJOIN ENFORCEMENT THEREOF.

(Filed 19 September 1975)

Plaintiff complaining alleges:

FIRST CAUSE OF ACTION

1. This is an action seeking an injunction restraining the enforcement of a statute of the state of North Carolina upon the ground of unconstitutionality of such statute. This action presents a question of law under the Constitution and laws of the United States as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. Plaintiff seeks a declaratory judgment that Section 189.1 of Chapter 106 of the North Carolina General Statutes (G. S. §106-189.1), to the extent the same applies to the sale, offer of sale or shipment into North Carolina of Washington State apples in closed containers, constitutes an unreasonable burden and restriction upon interstate commerce and is in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8; that it violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; and that it violates the plaintiff's right of free speech protected by the First Amendment to the Constitution of the United States. Plaintiff asks that an injunction be

granted to it permanently restraining the enforcement of said statute by the defendants against the sale, offer of sale or shipment into North Carolina of Washington States apples in closed containers.

3. This court has original jurisdiction of this action under 28 U.S.C. §1331, 28 U.S.C. §2201, and 28 U.S.C. §2202. This action arises under the Constitution of the United States, specifically Article I, Section 8, and the First and Fourteenth Amendments. Plaintiff seeks the convening of a three-judge court pursuant to 28 U.S.C. §2281 and §2284 because an injunction is sought restraining, on Federal Constitution grounds, the enforcement or execution of the North Carolina statute mentioned herein.

4. The plaintiff, Washington State Apple Advertising Commission, herein also referred to as the "Washington Apple Commission", is an agency of the state of Washington, and created by an act of the Washington Legislature as set forth in Revised Code of Washington 15.24. The plaintiff is empowered to sue and be sued. In addition, the Washington Apple Commission is charged, among other things, by statute with the stabilization and protection of the Washington State apple industry and the expansion and promotion of the market of Washington apples on behalf of Washington apple growers. The Washington Apple Commission is financed by assessments levied on all Washington State apple growers in the amount of 12 cents per each 100 pounds of gross billing weight of all apples grown and packed in the state of Washington. Such assessments totalled $1,737,-990.00 for the crop year 1974. Said assessments will be increased to 14 cents, effective September 1, 1975. The apple industry of the state of Washington ranks fourth agriculturally and makes a major economic contribution to the state.

5. All defendants are residents and citizens of North Carolina and their official residences are located within the

state of North Carolina and within the jurisdiction and venue of this court. Defendant James E. Holshouser, Jr., Governor of the state of North Carolina; defendant Rufus L. Edmisten, Attorney General for the state of North Carolina; and defendant James A. Graham, the Commissioner of Agriculture for the state of North Carolina, are officials of the state of North Carolina who are charged with the duty and responsibility of administering and enforcing the North Carolina statute mentioned herein.

6. The General Statutes of North Carolina, §106-189.1, as amended by Chapter 506 of the Session Laws of 1973, provide:

> (a) All apples sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U. S. grade or standard or the marking "unclassified", "not graded" or "grade not determined."
>
> (b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than Fifty Dollars ($50.00). Each day on which the apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

Said statute is presently in effect and will apply to the 1975 Washington State apple crop shipped into the state of North Carolina.

7. The Washington State apple industry produces approximately one-half of all apples grown in the United States which are shipped fresh in closed containers in interstate commerce and is the major shipper of apples into the state of North Carolina after approximately November of each year. For the crop year 1974, Washington growers shipped approximately 339,000 boxes of apples directly to the state of North

Carolina worth well in excess of $1,000,000.00. Additionally, in the 1974 crop year approximately 140,000 boxes of Washington apples were indirectly trans-shipped and sold to North Carolina buyers by distributors in surrounding states. The Washington Apple Commission spends substantial sums of money in advertising Washington apples and the Washington State apple grade within the state of North Carolina. For the crop year 1974, the Washington Apple Commission spent in excess of $25,000.00 for consumer advertising and trade promotion of Washington apples sold within the state of North Carolina.

8. The apples shipped into the state of North Carolina by Washington State apple growers are subject to rigorous standards of grade and quality which are enforced by a comprehensive inspection system jointly administered by both the United States Department of Agriculture and the Washington State Department of Agriculture. The applicable laws of the United States Government and the laws of the state of Washington and the regulations issued pursuant thereto govern the operation of this inspection system. Washington produced apples must be graded according to either Washington State apple standards (Washington State grade) or U. S. Department of Agriculture standards (U. S. grade), and such grade must be shown on all closed containers packed within the state of Washington. Washington State standards for apple grades are equal or superior to the standards of all equivalent U. S. grades. Over the years, the Washington State grade, as a result of strict enforcement of the inspection system, has developed and enjoys a superior trade acceptance and marketability in the industry because of grade consistency, uniformity and dependability.

9. It has been the practice of Washington State apple growers to order apple containers well before harvest, with the Washington state grade and variety pre-printed on the containers. As a result, substantial economies have been ef-

fected through such standardization of packaging and handling and by eliminating hand marking at the time of packing. The North Carolina statute has disrupted said procedures and economies by forcing the obliteration of Washington State grade on said pre-printed containers of Washington apples and individual re-marking with the U. S. grade either prior to shipment or after receipt in North Carolina. These requirements interfere with the orderly marketing of Washington State apples, result in confusion, special handling, inconvenience and expense, and give the container a mutilated appearance with consequent loss of acceptability.

10. The great majority of Washington State apple growers prefer to ship their apples under the Washington State grade because of its superior standards and premium trade acceptance. In increasing numbers, however, because of the burdensome requirements of the North Carolina statute, the Washington State apple industry, in order to continue to sell, offer for sale and ship apples into the state of North Carolina as a part of its established and existing marketing channels, is being forced to abandon the display of the Washington State grade and to substitute containers preprinted with the U. S. grade.

11. As a further direct result of the burdensome requirements of the North Carolina statute, some Washington State growers have refused to ship apples to North Carolina and some North Carolina buyers have refused to purchase apples from Washington State growers.

12. There is no bona fide public purpose served by requiring the obliteration of Washington State grades and the showing of the U. S. grade in lieu thereof, since Washington State grades are equal or superior to comparable U. S. grades in every respect. Nevertheless, the defendants and each of them, acting in their official capacities, threaten to enforce said statute, and the criminal penalties thereof,

against any person who violates the marking requirements of the North Carolina statute.

13. Washington State apple growers, and plaintiff, have suffered real, immediate, substantial and irreparable injury, damage and loss since the passage of the North Carolina statute as a result of the restraints and burdens on interstate commerce imposed as alleged herein. Said injury, damage and loss has amounted to more than $10,000.00 and the Washington State apple industry, as represented by plaintiff, will continue to sustain such irreparable injury, damage and loss, unless the court grants the relief prayed for herein. All said burdens and restraints placed on interstate commerce by said North Carolina statute are in violation of the Commerce Clause of Article I, Section 8, of the U. S. Constitution.

14. By way of further claim, the plaintiff alleges the North Carolina statute referred to herein was intended to insulate the North Carolina apple industry from outside competition and was enacted to treat apples differently from any other fresh fruit or commodity even though there was no stated or apparent reason for disparate treatment. Specifically, there is no rational basis for distinguishing apples from other types of fresh produce in the requirement that state grades be removed from closed containers of apples and U. S. grades only be shown instead, while allowing state grades only to be shown on closed containers of other fresh produce. Moreover, for no apparent reason, apples sold in "closed containers" are singled out for different treatment, under the North Carolina statute, than apples sold in open containers. Because of this disparate treatment, the North Carolina statute is violative of the equal protection clause of the Fourteenth Amendment of the U. S. Constitution.

15. By way of further claim, plaintiff alleges that because of the facts and circumstances herein set forth, the North Carolina statute deprives Washington State apple

growers and the plaintiff of their property rights without due process of law and constitutes a violation of the due process clause of the Fourteenth Amendment of the U. S. Constitution.

16. By way of further claim, plaintiff alleges that the North Carolina statute was intended to and does impose an unreasonable burden upon the rights of Washington State apple growers to exercise their right of free speech and, specifically, upon the plaintiff's right to display its state grades. Further, by requiring the obliteration of Washington State grades, this statute infringes upon the right of North Carolina apple buyers to know and use the Washington State apple grade in making their purchases in interstate commerce. Washington State apple grades have a long history, a common and well-known meaning, and a wide trade acceptance and dependence. This infringement of the right to know and the right of free speech violate the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution.

17. The plaintiff has no adequate remedy at law in that total damages would be perpetual and impossible to accurately measure or recover.

18. Washington State apple growers are entitled to sell, offer for sale, and ship their apples into the state of North Carolina in closed containers showing only the applicable Washington State grade and without any requirement that a U. S. grade be shown.

SECOND CAUSE OF ACTION

19. Plaintiff realleges Paragraphs 1 through 17 above.

20. Washington State apple growers are entitled to sell, offer for sale, and ship their apples into the state of North Carolina in closed containers showing the Washington State grade thereon in addition to any U. S. grade shown.

WHEREFORE, the plaintiff prays:

UNDER THE FIRST CAUSE OF ACTION

(a) That a three-judge court be convened pursuant to 28 U.S.C. §2281 and §2284.

(b) That the court determine and declare pursuant to 28 U.S.C. §2210 that North Carolina G. S. §106-189.1, to the extent the same applies to the sale, offer for sale or shipment into North Carolina of Washington State apples in closed containers, violates Article I, Section 8, of the United States Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the United States; that said statute violates the equal protection clause of the Fourteenth Amendment by providing that apples be treated differently and distinctly from other fresh fruits and vegetables and apples shipped in open containers; that said statute violates the due process clause of the Fourteenth Amendment by depriving the plaintiff and Washington State apple growers of their property rights in the conduct of their business in the state of North Carolina without due process of law; that said statute infringes upon the right of free speech guaranteed to the plaintiff and to Washington State apple growers to display and use their state grade in marketing their apples outside the state of Washington, and the right of buyers to know and use said grade, all as guaranteed by the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution.

(c) That this cause be advanced on a docket of this court for an early hearing, and this court issue a preliminary injunction after notice restraining and enjoining the defendants, James E. Holshouser, Jr., Governor of the state of North Carolina, Rufus L. Edmisten, Attorney General of the state of North Carolina, and James A. Graham, Commissioner of Agriculture of the state of North Carolina, from enforcing the provisions of North Carolina G. S. §106-189.1, to the extent the same applies to the sale, offer for sale or shipment into North Carolina of Washington State apples in closed containers, and that this preliminary injunction be effective against any persons whomsoever, pending the hearing and determination of this cause; and that upon the hearing of this cause, the injunction prayed for in the foregoing paragraph be made permanent and perpetual.

(d) That the plaintiff have its costs and such other and further relief as to this court may appear just and equitable.

UNDER THE SECOND CAUSE OF ACTION

(a) That a three-judge court be convened pursuant to 28 U.S.C. §2281 and §2284.

(b) That the court determine and declare pursuant to 28 U.S.C. §2210 that North Carolina G. S. §106-189.1, to the extent the same prohibits the display of Washington State grades on closed containers of Washington apples, violates Article 1, Section 8, of the United States Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the United States; that said statute violates the equal protection clause of the Fourteenth Amendment by providing that apples be treated differently and distinctly from other fresh fruits and vegetables and apples shipped in open containers; that said statute violates the due process clause of the Fourteenth Amendment by depriving the plaintiff and Washington State apple growers of their property rights in the conduct of their business in the state of North Carolina without due process of law; that said statute infringes upon the right of free speech guaranteed to the plaintiff and to Washington State apple

growers to display and use their state grade in marketing their apples outside the state of Washington, and the right of buyers to know and use said grades, all as guaranteed by the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution.

(c) That this cause be advanced on a docket of this court for an early hearing, and that this court issue a preliminary injunction after notice restraining and enjoining the defendants, James E. Holshouser, Jr., Governor of the state of North Carolina, Rufus L. Edmisten, Attorney General of the state of North Carolina, and James A. Graham, Commissioner of Agriculture of the state of North Carolina, from enforcing the provisions of North Carolina G. S. §106-189.1, to the extent the same prohibits the display of Washington State grades on closed containers of Washington apples, and that this preliminary injunction be effective against any persons whomsoever, pending the hearing and determination of this cause; and that upon the hearing of this cause, the injunction prayed for in the foregoing paragraph be made permanent and perpetual.

(d) That the plaintiff have its costs and such other and further relief as to this court may appear just and equitable.

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(Verification omitted in printing.)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF JOSEPH T. BROWNLOW

(Filed 19 September 1975)

JOSEPH T. BROWNLOW, being first duly sworn on oath, deposes and says:

1. I am the Manager of the Washington State Apple Advertising Commission (Washington Apple Commission), which has its headquarters in Wenatchee, Washington.

2. The Washington Apple Commission is financed by assessments levied on all Washington State apple growers in the amount of 14 cents (12 cents prior to September 1, 1975) per each 100 pounds of gross billing weight on all apples grown and packed in the state of Washington. Such assessments totalled $1,737,990.00 for the 1974 crop year.

3. Washington State is the nation's leading producer of apples, producing approximately 30% of the apples grown in the United States. Approximately 75% of this production is graded and packed and sold in closed containers for the fresh market. The balance is sold for processing. Of the apples sold in the fresh market, approximately 3% are exported to foreign countries, an additional 4% are sold and consumed in the state of Washington, and the remaining 93% are sold domestically in the other states. Approximately 50% of all apples shipped in closed containers to the fresh markets in interstate commerce are apples grown in the state of Washington.

4. Based upon statistics gathered by the Washington Apple Commission, Washington State growers in the 1974 crop year shipped approximately 339,000 boxes of apples directly to the state of North Carolina worth in excess of $2,000,000.00. For the same year, approximately 140,000 additional boxes of Washington apples were indirectly transshipped to North Carolina buyers by distributors and retailers in surrounding states.

5. During the 1974 crop year, Washington apple consumer advertising expenditures by the Washington Apple Commission in the state of North Carolina were in excess of $25,000.00.

6. It has been the practice of Washington State apple growers to order apple containers well before harvest, with the Washington state grade and variety preprinted on the containers. As a result, substantial economies have been effected through such standardization of packaging and handling and by eliminating hand marking at the time of packing. The North Carolina statute has disrupted said procedures and economies by forcing the obliteration of Washington State grade on said preprinted containers of Washington apples and individual re-marking with the U. S. grade either prior to shipment or after receipt in North Carolina. These requirements interfere with the orderly marketing of Washington State apples, result in confusion, special handling, inconvenience and expense, and give the container a mutilated appearance with consequent loss of acceptability.

7. Based upon statistics gathered and investigations made by the Washington Apple Commission, it has been ascertained it cost Washington apple shippers from 5 cents to 15 cents per box to comply with North Carolina G. S. §106-189.1. The cost for each shipper varies depending upon how many sides of the carton is preprinted with the

Washington State grade, how large the Washington State grade is printed, whether the cartons must be depalletized, and how the obliteration is accomplished. It is estimated it cost Washington apple growers in excess of $30,000.00 in each of the 1973 and 1974 crop years to comply with the North Carolina regulation. There will be a similar per box cost of compliance during the 1975 crop year for those containers preprinted with the Washington State grade and such damage will be immediate and irreparable.

8. The great majority of Washington State apple growers prefer to ship their apples under the Washington State grade because of its superior standards and premium trade acceptance. In increasing numbers, however, because of the burdensome requirements of the North Carolina statute, the Washington State apple industry, in order to continue to sell, offer for sale and ship apples into the state of North Carolina as a part of its established and existing marketing channels, is being forced to abandon the display of the Washington State grade and to substitute containers preprinted with the U. S. grade.

9. As a further direct result of the burdensome requirements of the North Carolina statute, some Washington State growers have refused to ship apples to North Carolina and some North Carolina buyers have refused to purchase apples from Washington State growers.

10. Washington apples sold at retail rarely are in closed containers, showing the Washington State grade, except for those sold in prepacked plastic bags.

11. Washington State apple grades have been in existence approximately sixty years and have gained a substantial trade acceptance and meaning in the fresh fruit wholesaling business. U. S. grades standards for boxed apples have been in existence since 1930. Since the Agricultural Adjustment Act, establishing joint federal and state inspections, allows for substantial regional control throughout the United States over inspection services, there is a lack of uniformity of interpretation of U. S. grades standards between states. On the other hand, Washington State apple grades are given careful, uniform and consistent application within the state of Washington. Moreover, all apples which are shipped out of the state of Washington must meet stringent and mandatory inspection requirements. This mandatory inspection at the point of origin is unique throughout the apple industry. Washington State grades emphasize color to a much greater degree than do U. S. grades. It is common for apple dealers outside the state of Washington to buy using the Washington State grades in preference to U. S. grades because of their consistent application, emphasis on color and supporting mandatory inspections.

12. On August 16, 1974, with a follow-up letter dated September 16, 1974, affiant wrote James A. Graham, Commissioner of Agriculture for the state of North Carolina, forwarding a published copy of the Washington State standards for apples, which equal or exceed the U. S. Department of Agriculture standards for apples, requesting permission to ship apples in closed containers to North Carolina showing both the Washington grade and the U. S. grade. The North Carolina Commissioner of Agriculture replied by letter dated September 18, 1974, denying permission to show both Washington State and U. S. grades, stating:

> I naturally want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed and I have asked the Secretary of the Apple Growers Association to bring this matter to the attention of their Board at its next meeting.

Subsequently affiant received a letter dated October 17, 1974, from the Attorney General for the State of North

Carolina stating that it would require the General Assembly of North Carolina to amend or rescind North Carolina General Statute §106-189.1 before apples in closed containers could be shipped from the state of Washington into North Carolina bearing the Washington State grade in addition to the U. S. grade. Copies of these letters are attached hereto and incorporated herein as Exhibits "A", "B", "C" and "D".

13. The Washington Apple Commission is an agency of the state of Washington created by an act of the Washington Legislature, as set forth in RCW 15.24. Among the purposes for which the Commission was created, as set forth in RCW 15.24.900, are, in the exercise of the police power of the state, stabilization and protection of the apple industry, and the expanding and promotion of its markets. The Commission is empowered to sue and be sued under RCW 15.24.070 in the exercise of its powers and purposes on behalf of Washington State and its apple industry.

JOSEPH T. BROWNLOW

(Jurat omitted in printing)

(Exhibits A, B and D omitted in printing)

EXHIBIT "C"

STATE OF NORTH CAROLINA
Department of Agriculture
Raleigh

James A. Graham, Commissioner

Sept. 18, 1974

Mr. Joseph T. Brownlow, Manager
Washington Apple Commission
P. O. Box 18
Wenatchee, Washington 98801

Dear Mr. Brownlow:

I regret this delay in replying to your letter of August 16. Actually, the letter was late arriving in my office and it was passed on for review by other members of my staff which, together, account for this delay.

I can appreciate the reason for your request for permission to ship Washington state apples into into North Carolina bearing both the Washington state and U. S. grades. As you know, however, before such permission can be granted, it will be necessary to have the law which was passed in the 1973 legislature amended to permit this. I naturally want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed and I have asked the Secretary of the Apple Growers Association to bring this matter to the attention of their Board at its next meeting.

I will be pleased to keep you informed of their expressed sentiments to me.

Cordially,

JAMES A. GRAHAM

James A. Graham
JAG/k

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF STEWART BLEDSOE

(Filed 19 September 1975)

STEWART BLEDSOE, being first duly sworn on oath, deposes and says:

1. I am the Director of the Washington State Department of Agriculture.

2. On July 26, 1974, I promulgated Washington State standards for apples under Order No. 1374 to become effective September 1, 1974. These standards are incorporated into Washington Administrative Code §16-403-135, et seq. The Washington State standards for apple grades are equivalent to or better than the comparable U. S. standards for grades of apples and exceed the U. S. standards in the following respects:

(a) The Washington State standards for apples require a higher intensity of red color in the red varieties of apples than do the U. S. standards.

(b) The Washington State standards for apples require well formed apples in the extra fancy grade for the Golden Delicious variety and the U. S. standards require only a fairly well formed apple.

(c) In many respects, the Washington standards for apples require a smaller area of defects and blemishes than do the U. S. standards, and in no case do the

Washington State standards allow a greater area of defects and blemishes than do the U. S. standards.

* * *

3. Apples exported from the state of Washington to sister states are subject to rigorous standards of grade and quality which are enforced by a comprehensive inspection system jointly administered by the U. S. Department of Agriculture and the Washington State Department of Agriculture. The applicable laws and regulations of the U. S. Government and the laws and regulations of the state of Washington govern the operation of this system. The Washington packed apples must be graded according to either Washington State or U. S. Department of Agriculture apple grades, and such grades must be shown on all containers packed within the state of Washington. The Washington State apple grades are vigorously enforced by inspectors who are authorized to grade either by Washington State apple grades or U. S. Department of Agriculture grades.

4. Washington State requires the inspection of all apples and that they be in full compliance at the time of shipment with the grade standards displayed on the container. This mandatory inspection system for apples, which includes all apples shipped from the state of Washington in interstate commerce or in foreign commerce, is unique among apple producing states and the state of Washington is the only state requiring such inspection.

STEWART BLEDSOE

(Jurat omitted in printing)

(Attachment omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

MOTION TO DISMISS

(Filed 7 October 1975)

NOW COME the defendants herein, through their attorneys, and move the Court for an order dismissing the action for the following reasons:

I.

Defendants move the Court, pursuant to Rule 17(a) of the Federal Rules of Civil Procedure, for an order dismissing plaintiff's action because the action is not being prosecuted by the real party in interest.

In support of its motion, defendants show unto the Court the following:

1. Plaintiff is an agency charged with the "expansion and promotion of the market of Washington apples on behalf of Washington apple growers." (Complaint p. 3).

2. Plaintiff "spends substantial sums of money in *advertising* Washington apples . . ." (Complaint p. 4) (emphasis added).

3. Plaintiff neither grows nor sells apples, but is purely and simply an advertising agency for the Washington State apple growers.

4. Rule 17 of the Federal Rules of Civil Procedure require that every action be prosecuted in the name of the real party in interest.

5. Defendants believe, and therefore allege, that the real parties in interest in this matter are the growers and shippers of Washington apples.

6. Defendants believe, and therefore allege, that the plaintiff is without standing to litigate this matter in that it cannot show injury to any legally protected interest which it can rightfully claim.

II.

Defendants move the Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for an order dismissing plaintiff's complaint for the reason that the Court lacks jurisdiction over the subject matter.

In support of the motion, the defendants show unto the Court the following:

1. The plaintiff alleges that the Court has jurisdiction of the action under 28 U.S.C. §1331. For the Court to have jurisdiction under that section, the matter in controversy must exceed the sum of $10,000.00. This threshold jurisdictional requirement cannot be met by the plaintiff in this matter, notwithstanding his broadside allegations to the contrary. (Complaint p. 1).

2. Plaintiff does not claim that it grows or ships apples to North Carolina. It does not claim that North Carolina Gen. Stat. 106-189.1 requires or results in the expenditure, or loss, by the plaintiff, of a single dollar. Plaintiffs allegations of monetary loss are allegations that individuals other than plaintiff have suffered loss, or will suffer loss. Those allegations are insufficient to meet the jurisdictional amount requirement imposed by 28 U.S.C. §1331.

III.

Defendants request an early hearing of this Motion to Dismiss, as the disposition of the Motion may render

unnecessary the hearing which plaintiff has requested in its Motion for a preliminary injunction.

Dated: 7 October, 1975.

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(Certificate of service omitted in printing.)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

FIRST AMENDED COMPLAINT TO DECLARE SECTION 189.1 OF CHAPTER 106 OF THE NORTH CAROLINA GENERAL STATUTES UNCONSTITUTIONAL AND ENJOIN ENFORCEMENT THEREOF

(Filed 5 December 1975)

Plaintiff complaining alleges:

FIRST CAUSE OF ACTION

1. This is an action seeking an injunction restraining the enforcement of a statute of the state of North Carolina upon the ground of unconstitutionality of such statute. This action presents a question of law under the Constitution and laws of the United States as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. Plaintiff seeks a declaratory judgment that Section 189.1 of Chapter 106 of the North Carolina General Statutes (G. S. §106-189.1), to the extent the same applies to the sale, offer of sale or shipment into North Carolina of Washington State apples in closed containers, on the grounds that it constitutes an unreasonable burden and restriction upon interstate commerce and is in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8; that it violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; and that it violates the civil rights of the individual Washington State apple growers, as

represented by Plaintiff and those of Plaintiff, including the rights of free speech, due process and equal protection secured by the Constitution of the United States. Plaintiff asks that an injunction be granted to it permanently restraining the enforcement of said statute by the defendants against the sale, offer of sale or shipment into North Carolina of Washington State apples in closed containers.

3. This court has original jurisdiction of this action under 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §2201, and 28 U.S.C. §2202. This action arises under the Constitution of the United States, specifically Article I, Section 8, and the First and Fourteenth Amendments and 42 U.S.C. §1983. Plaintiff seeks the convening of a three-judge court pursuant to 28 U.S.C. §2281 and §2284 because an injunction is sought restraining, on Federal grounds, the enforcement of execution of the North Carolina statute mentioned herein.

4. The plaintiff, Washington State Apple Advertising Commission, herein also referred to as the "Washington Apple Commission", is an agency of the state of Washington, and created by an act of the Washington Legislature as set forth in Revised Code of Washington 15.24. The plaintiff is a corporate body empowered by statute to sue and be sued. In addition, the Washington Apple Commission is charged, among other things, by statute with the stabilization and protection of the Washington State apple industry and its general welfare, and with the expansion and protection of the foreign and domestic markets of Washington apples on behalf of individual Washington apple growers. A copy of Revised Code of Washington 15.24, the statute under which the Apple Commission was created and which sets forth its powers and duties, is attached hereto as Exhibit A and incorporated herein.

5. The Washington Apple Commission is financed by assessments levied on all Washington State apple growers

in the amount of 12 cents per each 100 pounds of gross billing weight of all apples grown and packed in the state of Washington. Such assessments totalled $1,737,990.00 for the crop year 1974. Said assessments were increased to 14 cents, effective September 1, 1975. The apple industry of the state of Washington ranks fourth agriculturally and makes a major economic contribution to the state.

6. All defendants are residents and citizens of North Carolina and their official residences are located within the state of North Carolina and within the jurisdiction and venue of this court. Defendant James E. Holshouser, Jr., Governor of the state of North Carolina; defendant Rufus L. Edmisten, Attorney General for the state of North Carolina; and defendant James A. Graham, the Commissioner of Agriculture for the state of North Carolina, are officials of the state of North Carolina who are charged with the duty and responsibility of administering and enforcing the North Carolina statute mentioned here.

7. The General Statutes of North Carolina, §106-189.1, as amended by Chapter 506 of the Session Laws of 1973, provide:

> (a) All apples sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U. S. grade or standard or the marking "unclassified", "not graded" or "grade not determined."
>
> (b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than Fifty Dollars (50.00). Each day on which the apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

Said statute is presently in effect and will apply to the 1975 Washington State apple crop shipped into the state of North Carolina.

8. The Washington State apple industry produces approximately one-half of all apples grown in the United States which are shipped fresh in closed containers in interstate commerce and is the major shipper of apples into the state of North Carolina after approximately November of each year. For the crop year 1974, Washington growers shipped approximately 339,000 boxes of apples directly to the state of North Carolina worth well in excess of $1,000,000.00. Additionally, in the 1974 crop year approximately 140,000 boxes of Washington apples were indirectly trans-shipped and sold to North Carolina buyers by distributors in surrounding states. The Washington Apple Commission spends substantial sums of money in advertising Washington apples and the Washington State apple grade within the state of North Carolina. For the crop year 1974, the Washington Apple Commission spent in excess of $25,000.00 for consumer advertising and trade promotion of Washington apples sold within the state of North Carolina.

9. The apples shipped into the state of North Carolina by Washington State apple growers are subject to rigorous standards of grade and quality which are enforced by a comprehensive inspection system jointly administered by both the United States Department of Agriculture and the Washington State Department of Agriculture. The applicable laws of the United States Government and the laws of the state of Washington and the regulations issued pursuant thereto govern the operation of this inspection system. Washington produced apples must be graded according to either Washington State apple standards (Washington State grade) or U. S. Department of Agriculture standards (U. S. grade), and such grade must be shown on all closed containers packed within the state of Washington. Washington State standards for apple grades are equal or superior to the standards of all equivalent U. S. grades. Over the years, the Washington State grade, as a result of strict enforcement of the inspection system, has developed and enjoys a

superior trade acceptance and marketability in the industry because of grade consistency, uniformity and dependability.

10. It has been the practice of Washington State apple growers to order apple containers well before harvest, with the Washington state grade and variety pre-printed on the containers. As a result, substantial economies have been effected through such standardization of packaging and handling and by eliminating hand marking at the time of packing. The North Carolina statute has disrupted said procedures and economies by forcing the obliteration of Washington State grade on said pre-printed containers of Washington apples and individual re-marking with the U. S. grade either prior to shipment or after receipt in North Carolina. These requirements interfere with the orderly marketing of Washington State apples, result in confusion, special handling, inconvenience and expense to the individual growers thereof, and give the container a mutilated appearance with consequent loss of acceptability.

11. The great majority of Washington State apple growers prefer to ship their apples under the Washington State grade because of its superior standards and premium trade acceptance. In increasing numbers, however, because of the burdensome requirements of the North Carolina statute, the Washington State apple industry and its individual growers, in order to continue to sell, offer for sale and ship apples into the state of North Carolina as a part of its established and existing marketing channels, are being forced to abandon the display of the Washington State grade and to substitute containers pre-printed with the U. S. grade.

12. As a further direct result of the burdensome requirements of the North Carolina statute, some Washington State growers have refused to ship apples to North Carolina and some North Carolina buyers have refused to purchase apples from Washington State growers causing said growers to suffer irreparable injury.

13. There is no bona fide public purpose served by requiring the obliteration of Washington State grades and the showing of the U. S. grade in lieu thereof, since Washington State grades are equal or superior to comparable U. S. grades in every respect. Nevertheless, the defendants and each of them, acting in their official capacities, threaten to enforce said statute, and the criminal penalties thereof, against any person who violates the marking requirements of the North Carolina statute.

14. Washington State apple growers, and plaintiff, have suffered real, immediate, substantial and irreparable injury, damage and loss since the passage of the North Carolina statute as a result of the restraints and burdens on interstate commerce imposed as alleged herein. Said injury, damage and loss has amounted to more than $10,000.00 and the Washington State apple industry and its individual growers, as represented by plaintiff, will continue to sustain such irreparable injury, damage and loss, unless the court grants the relief prayed for herein. All said burdens and restraints placed on interstate commerce by said North Carolina statute are in violation of the Commerce Clause of Article I, Section 8, of the U. S. Constitution.

15. By way of further claim, the plaintiff alleges the North Carolina statute referred to herein was intended to insulate the North Carolina apple industry from outside competition and was enacted to treat apples differently from any other fresh fruit or commodity even though there was no stated or apparent reason for disparate treatment. Specifically, there is no rational basis for distinguishing apples from other types of fresh produce in the requirement that state grades be removed from closed containers of apples and U. S. grades only be shown instead, while allowing state grades only to be shown on closed containers of other fresh produce. Moreover, for no apparent reason, apples sold in "closed containers" are singled out for different treatment, under the North Carolina statute, than apples sold in open containers. Because of this disparate treatment, the North Carolina statute is violative of the equal protection clause of the Fourteenth Amendment of the U. S. Constitution.

16. By way of further claim, plaintiff alleges that because of the facts and circumstances herein set forth, the North Carolina statute deprives Washington State apple growers and the plaintiff of their property rights without due process of law and constitutes a violation of the due process clause of the Fourteenth Amendment of the U. S. Constitution and 42 U.S.C. §1983.

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17. By way of further claim, plaintiff alleges that the North Carolina statute was intended to and does impose an unreasonable burden upon the rights of individual Washington State apple growers to exercise their right of free speech and, specifically, upon the right of plaintiff and individual growers to display the Washington State grades. Further, by requiring the obliteration of Washington State grades, this statute infringes upon the right of North Carolina apple buyers to know and use the Washington State apple grade in making their purchases in interstate commerce. Washington State apple grades have a long history, a common and well-known meaning, and a wide trade acceptance and dependence. This infringement of the right to know and the right of free speech violate the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution.

18. The plaintiff, and the individual Washington apple growers, have no adequate remedy at law in that total damages would be perpetual and impossible to accurately measure or recover.

19. Washington State apple growers are entitled to sell, offer for sale, and ship their apples into the state of North Carolina in closed containers showing only the applicable Washington State grade and without any requirement that a U. S. grade be shown.

SECOND CAUSE OF ACTION

20. Plaintiff realleges Paragraphs 1 through 18 above.

21. Washington State apple growers are entitled to sell, offer for sale, and ship their apples into the state of North Carolina in closed containers showing the Washington State grade thereon in addition to any U. S. grade shown.

WHEREFORE, the plaintiff prays:

UNDER THE FIRST CAUSE OF ACTION

(a) That a three-judge court be convened pursuant to 28 U.S.C. §2281 and §2284.

(b) That the court determine and declare pursuant to 28 U.S.C. §2210 that North Carolina G.S. §106-189.1, to the extent the same applies to the sale, offer for sale or shipment into North Carolina of Washington State apples in closed containers, violates Article I, Section 8, of the United States Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the United States; that said statute violates the equal protection clause of the Fourteenth Amendment by providing that apples be treated differently and distinctly from other fresh fruits and vegetables and apples shipped in open containers; that said statute violates the due process clause of the Fourteenth Amendment by depriving the plaintiff and Washington State apple growers of their property rights in the conduct of their business in the state of North Carolina without due process of law; that said statute infringes upon the rights of free

speech guaranteed to the plaintiff and to Washington State apple growers to display and use their state grade in marketing their apples outside the state of Washington, and the right of buyers to know and use said grade, all as guaranteed by the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution; and that said statute violates the civil rights of the individual Washington State apple growers, as represented by plaintiff and those of plaintiff, including the rights of free speech, due process and equal protection secured by the Constitution of the United States.

(c) That this cause be advanced on a docket of this court for an early hearing, and that this court issue a preliminary injunction after notice restraining and enjoining the defendants, James E. Holshouser, Jr., Governor of the state of North Carolina, Rufus L. Edmisten, Attorney General of the state of North Carolina and James A. Graham, Commissioner of Agriculture of the state of North Carolina, from enforcing the provisions of North Carolina G.S. §106-189.1, to the extent the same applies to the sale, offer for sale or shipment into North Carolina of Washington State apples in closed containers, and that this preliminary injunction be effective against any persons whomsoever, pending the hearing and determination of this cause; and that upon the hearing of this cause, the injunction prayed for in the foregoing paragraph be made permanent and perpetual.

(d) That the plaintiff have its costs and such other and further relief as to this court may appear just and equitable.

UNDER THE SECOND CAUSE OF ACTION

(a) That a three-judge court be convened pursuant to 28 U.S.C. §2210 that North Carolina G.S. §106-189.1, to the extent the same prohibits the display of Washington

State grades on closed containers of Washington apples, violate Article I, Section 8, of the United States Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the United States; that said statute violates the equal protection clause of the Fourteenth Amendment by providing that apples be treated differently and distinctly from other fresh fruits and vegetables and apples shipped in open containers; that said statute violates the due process clause of the Fourteenth Amendment by depriving the plaintiff and Washington State apple growers of their property rights in the conduct of their business in the state of North Carolina without due process of law; that said statute infringes upon the right of free speech guaranteed to the plaintiff and to Washington State apple growers to display and use their state grade in marketing their apples outside the state of Washington, and the right of buyers to know and use said grade, all as guaranteed into the due process clause of the Fourteenth Amendment of the U. S. Constitution; and that said statute violates the civil rights of the individual Washington State apple growers, as represented by plaintiff and those of plaintiff, including the rights of free speech, due process and equal protection secured by the Constitution of the United States.

(c) That this cause be advanced on a docket of this court for an early hearing, and that this court issue a preliminary injunction after notice restraining and enjoining the defendants, James E. Holshouser, Jr., Governor of the state of North Carolina, Rufus L. Edmisten, Attorney General of the state of North Carolina, and James A. Graham, Commissioner of Agriculture of the state of North Carolina, from enforcing the provisions of North Carolina G.S. §106-189.1, to the extent the same prohibits the display of Washington State grades on closed containers of Washington apples, and that this preliminary injunction be effective against any persons whomsoever, pending the hearing and determination of this cause; and that upon the hearing of this cause,

the injunction prayed for in the foregoing paragraph be made permanent and perpetual.

(d) That the plaintiff have its costs and such other and further relief as to this court may appear just and equitable.

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Robert C. Howison, Jr.

(Verification and certificate of service omitted in printing)

EXHIBIT A

CHAPTER 15.24

APPLE ADVERTISING COMMISSION

Sections

15.24.010 Definitions.

15.24.020 Commission created — Qualifications of members.

15.24.030 Members—Election—Terms of office—District subdivisions—Meetings of commission.

15.24.040 Members—Nominations—Method of election.

15.24.050 Vacancies—Quorum—Compensation.

15.24.060 Commission records as evidence.

15.24.070 Powers and duties.

15.24.080 Research, advertising, and educational campaign.

15.24.085 Promotional printing not restricted by public printer laws.

15.24.086 Promotional printing contracts — Contractual conditions of employment.

15.24.090 Report to director—Increased assessments.

15.24.100 Assessments levied.

15.24.110 Collection—Due date—Stamps.

15.24.120 Records kept by dealers, handlers, processors.

15.24.130 Returns rendered by dealers, handlers, processors.

15.24.140 Right to inspect.

15.24.150 Treasurer—Bond—Duties—Funds.

15.24.160 Promotional plans—Cooperation of commission.

15.24.170 Rules and regulations—Filing—Publication.

15.24.180 Enforcement.

15.24.190 Nonliability of state, members, employees.

15.24.200 Penalties.

15.24.210 Prosecutions.

15.24.900 Purpose of chapter.

15.24.910 Liberal construction.

15.24.920 Severability, chapter 240, Laws of 1967.

15.24.010 *Definitions.* As used in this chapter:

(1) "Commission" means the Washington state apple advertising commission;

(2) "Ship" means to load apples into a conveyance for transport, except apples being moved from the orchard where grown to a packing house or warehouse within the immediate area of production;

(3) "Handler" means any person who ships or initiates a shipping operation, whether for himself or for another;

(4) "Dealer" means any person who handles, ships, buys, or sells apples, or who acts as sales or purchasing agent, broker, or factor of apples;

(5) "Processor" and "processing plant" means every person to whom and every place to which apples are delivered for drying, dehydrating, canning, pressing, powdering, extracting, cooking, or for use in producing a product or manufacturing a manufactured article;

(6) "Processing apples" means all apples delivered to a processing plant for drying, dehydrating, canning, pressing, powdering, extracting, cooking, or for use in producing a product or manufacturing a manufactured article;

(7) "Fresh apples" means all apples other than processing apples;

(8) "Director" means the director of the department of agriculture or his duly authorized representative;

(9) "District No. 1" includes the counties of Chelan, Okanogan, and Douglas;

(10) "District No. 2" includes the counties of Kittitas, Yakima, Benton, and Franklin;

(11) "District No. 3" includes all counties in the state not included in the first and second districts; and

(12) "Executive officer" includes, but is not limited to, the principal management executive, sales manager, general manager, or other executive employee of similar responsibility and authority.

15.24.020 *Commission created — Qualifications of members.* There is hereby created a Washington state apple advertising commission to be thus known and designated. The commission shall be composed of nine practical apple producers and four practical apple dealers. The director shall be an ex officio member of the commission without vote.

The nine producer members shall be citizens and residents of this state, over the age of twenty-five years, each of whom, either individually or as an executive officer of a corporation, firm or partnership, is and has been actually engaged in growing and producing apples within the state of

Washington for a period of five years, and has during that period derived a substantial portion of his income therefrom: *Provided,* That he may own and operate an apple warehouse and pack and store apples grown by others, without being disqualified, so long as a substantial quantity of the apples handled in such warehouse are grown by him; and he may sell apples grown by himself and others so long as he does not sell a larger quantity of apples grown by others than those grown by himself. The four dealer members shall be persons who, either individually or as executive officers of a corporation, firm, partnership, association, or cooperative organization, are and have been actively engaged as dealers in apples within the state of Washington for a period of five years, and are citizens and residents of this state. The qualifications of members of the commission as herein set forth must continue during their term of office.

15.24.030 *Members — Election — Terms of office — District subdivisions — Meetings of commission.* Thirteen persons with the qualifications stated in RCW 15.24.020 as amended in section 23, chapter 240, Laws of 1967 shall be elected members of said commission. Four of the grower members, being positions one, two, three and four, shall be from district No. 1, at least one of whom shall be a resident of and engaged in growing and producing apples in Okanogan county; four of the grower members, being positions five, six, seven and eight, from district No. 2; and one grower member, being position nine from district No. 3. Two of the dealer members, being positions ten and eleven, shall be from district No. 1; and two of the dealer members, being positions twelve and thirteen, shall be from district No. 2.

The commission shall have authority in its discretion to establish by regulation one or more subdivisions of district No. 1 and one or more subdivisions of district No. 2; provided that each of the same includes a substantial apple producing district or districts, and provided the same does

not result in an unfair or unequitable voting situation or an unfair or unequitable representation of apple growers on said commission. In such event each of said subdivisions shall be entitled to be represented by one of the said grower members of the commission, who shall be elected by vote of the qualified apple growers in said subdivision of said district, and who shall be a resident of and engaged in growing and producing apples in said subdivision.

The regular term of office of the members of the commission shall be three years from March 1 following their election and until their successors are elected and qualified. The commission shall hold its annual meeting durirg the month of March each year for the purpose of electing officers and the transaction of other business and shall hold such other meetings during the year as it shall determine.

15.24.040 *Members -- Nominations — Method of Election.* The director shall call a meeting of apple growers in each of the three districts and meetings of apple dealers in district No. 1 and district No. 2 for the purpose of nominating their respective members of the commission, when a term is about to expire, or when a vacancy exists, except as provided in RCW 15.24.050, as amended, at times and places to be fixed by the commission. Said meetings shall be held not later than February 15th of each year and insofar as practicable, the said meetings of the growers shall be held at the same time and place as the annual state and district meetings of the Washington state horticultural association and its affiliated clubs, but not while the same are in actual session. Public notice of such meetings shall be given by the commission in such manner as it may determine: *Provided,* That nonreceipt of the notice by any interested person shall not invalidate the proceedings. Any qualified person may be nominated orally for such positions at the said respective meetings. Nominations may also be made within five days after any such meeting by written petition filed in the Wenatchee office of the commission, signed by not less than

five apple growers or dealers, as the case may be, residing within the district or within the subdivision if the nomination is made from a subdivision.

The members of the commission shall be elected by secret mail ballot under the supervision of the director: *Provided,* That in any case where there is but one nomination for a position, a secret mail ballot shall not be conducted or required and the director shall certify the candidate to be elected. Grower members of the commission shall be elected by a majority of the votes cast by the apple growers in the respective districts or subdivisions thereof, as the case may be, each grower who operates a commercial producing apple orchard, whether an individual proprietor, partnership, joint venture, or corporation, being entitled to one vote. As to bona fide leased or rented orchards, only the lessee-operator, if otherwise qualified, shall be entitled to vote. An individual commercial orchard operator, if otherwise qualified, shall be entitled to vote as such, even though he is also a member of a partnership or corporation which votes for other apple acreage. Dealer members of the commission shall be elected by a majority of the votes cast by the apple dealers in the respective districts, each dealer being entitled to one vote. If a nominee does not receive a majority of the votes on the first ballot, a run-off election shall be held by mail in a similar manner between the two candidates for such position receiving the largest number of votes.

15.24.050 *Vacancies — Quorum — Compensation.* In the event a position becomes vacant due to resignation, disqualification, death, or for any other reason, such position until the next annual meeting shall be filled by vote of the remaining members of the commission. At such annual meeting a commissioner shall be elected to fill the balance of the unexpired term.

A majority of the voting members shall constitute a quorum for the transaction of all business and the carrying out of the duties of said commission.

No member of the commission shall receive any salary or other compensation, but each member shall receive a sum to be determined by the commission but not more than twenty dollars per day for each day spent in actual attendance on or traveling to and from meetings of the commission, or on special assignment for the commission, together with actual expenses incurred in carrying out the provisions of this chapter.

15.24.060 *Commission records as evidence.* Copies of the proceedings, records and acts of the commission, when certified by the secretary and authenticated by the corporate seal, shall be admissible in any court as prima facie evidence of the truth of the statements contained therein.

15.24.070 *Powers and duties.* The Washington state apple advertising commission is hereby declared and created a corporate body. The powers and duties of the commission shall include the following:

(1) To elect a chairman and such other officers as it deems advisable; and to adopt, rescind, and amend rules, regulations, and orders for the exercise of its powers hereunder, which shall have the force and effect of the law when not inconsistent with existing laws;

(2) To administer and enforce the provisions of this chapter, and do all things reasonably necessary to effectuate the purposes of this chapter;

(3) To employ and at its pleasure discharge a manager, secretary, agents, attorneys, and employees as it deems necessary, and to prescribe their duties and powers and fix their compensation;

(4) To establish offices and incur expense and enter into contracts and to create such liabilities as may be reasonable for the proper administration and enforcement of this chapter;

(5) To investigate and prosecute violations hereof;

(6) To conduct scientific research to develop and discover the health, food, therapeutic, and dietetic value of apples and products thereof;

(7) To keep accurate record of all its dealings, which shall be open to inspection and audit by the state auditor;

(8) To sue and be sued, adopt a corporate seal, and have all of the powers of a corporation.

15.24.080 *Research, advertising, and educational campaign.* The commission shall provide for and conduct a comprehensive and extensive research, advertising and educational campaign as continuous as the crop, sales and market conditions reasonably require. It shall investigate and ascertain the needs of producers, conditions of the markets and extent to which public convenience and necessity require research and advertising to be conducted.

15.24.085 *Promotional printing not restricted by public printer laws.* The restrictive provisions of chapter 43.78 shall not apply to promotional printing and literature for the Washington state apple advertising commission, the Washington state fruit commission, or the Washington state dairy products commission.

15.24.086 *Promotional printing contracts — Contractual conditions of employment.* All such printing contracts provided for in this section and RCW 15.24.085 shall be executed and performed under conditions of employment which shall substantially conform to the laws of this state respecting hours of labor, the minimum wage scale for women and minors, and the rules and regulations of the industrial welfare committee regarding conditions of employment, hours of labor, and minimum wages, and the violation of such

provision of any contract shall be ground for cancellation thereof.

15.24.090 *Report to director — Increased assessments.* If it appears from investigation by the commission that the revenue from the assessment levied on fresh apples hereunder is inadequate to accomplish the purposes of this chapter the commission shall adopt a resolution setting forth the necessities of the industry, extent and probable cost of the required research, market promotion and advertising, extent of public convenience, interest and necessity, and probable revenue from the assessment levied. It shall thereupon increase the assessment to such sum as shall be determined by the commission to be necessary for such purposes based upon a rate per one hundred pounds of apples, gross billing weight, shipped in bulk, container or any style of package; but no increase shall be made prior to adoption of said resolution. An increase shall become effective sixty days after such resolution is adopted: *Provided,* That no increase in such assessment shall become effective unless the same shall be first referred by the commission to a referendum mail ballot by the apple growers of this state conducted under the supervision of the director and be approved by a majority of such growers voting thereon and also be approved by voting growers who operate more than fifty percent of the acreage voted in the same election: *Provided further,* That after such mail ballot, if the same be favorable to such increase, the commission shall nevertheless exercise its independent judgment and discretion as to whether or not to approve such increase: *And provided further,* That in any event such increase shall not amount to more than two cents per one hundred pounds of apples, gross billing weight, in any one year.

15.24.100 *Assessments levied.* There is hereby levied upon all fresh apples grown annually in this state, and all apples packed as Washington apples, an assessment of twelve cents on each one hundred pounds gross billing weight, plus such

annual increases thereof as are imposed pursuant to the provisions of RCW 15.24.090. All moneys collected hereunder shall be expended to effectuate the purpose and objects of this chapter.

15.24.110 *Collection — Due date — Stamps.* The assessments on fresh apples shall be paid, or provision made therefor satisfactory to the commission, prior to shipment, and no fresh apples shall be carried, transported, or shipped by any person or by any carrier, railroad, truck, boat, or other conveyance until the assessment has been paid or provision made therefor satisfactory to the commission.

The commission shall by rule or regulation prescribe the method of collection, and for that purpose may require stamps to be known as "apple advertising stamps" to be purchased from the commission and attached to the containers, invoices, shipping documents, inspection certificates, releases, or receiving receipts or tickets.

15.24.120 *Records kept by dealers, handlers, processors.* Each dealer, handler, and processor shall keep a complete and accurate record of all apples handled, shipped, or processed by him. This record shall be in such form and contain such information as the commission may by rule or regulation prescribe, and shall be preserved for a period of two years, and be subject to inspection at any time upon demand of the commission or its agents.

15.24.130 *Returns rendered by dealers, handlers, processors.* Each dealer, handler, and processor shall at such times as the commission may by rule or regulation require, file with the commission a return under oath on forms to be furnished by the commission, stating the quantity of apples handled, shipped, or processed by him during the period prescribed by the commission. The return shall contain such further information as the commission may require.

15.24.140 *Right to inspect.* The commission may inspect the premises and records of any carrier, handler, dealer, or processor for the purpose of enforcing this chapter and the collection of the excise tax.

15.24.150 *Treasurer — Bond — Duties — Funds.* The commission shall appoint a treasurer who shall file with it a fidelity bond executed by a surety company authorized to do business in this state, in favor of the commission and the state, in the penal sum of fifty thousand dollars, conditioned upon the faithful performance of his duties and strict accounting of all funds of the commission.

All money received by the commission, or any other state official from the assessment herein levied, shall be paid to the treasurer, deposited in such banks as the commission may designate, and disbursed by order of the commission. None of the provisions of RCW 43.01.050 shall apply to money collected under this chapter.

15.24.160 *Promotional plans — Cooperation of commission.* The commission may employ, designate as agent, act in concert with, and enter into contracts with any person, council, or commission for the purpose of promoting the general welfare of the apple industry and particularly for the purpose of assisting in the sale and distribution of apples in domestic or foreign commerce, and expend its funds or such portion thereof as it may deem necessary or advisable for such purpose and for the purpose of paying its proportionate share of the cost of any program providing direct or indirect assistance to the sale and distribution of apples in domestic or foreign commerce. For such purposes it may employ and pay for legal counsel and contract and pay for other professional services.

15.24.170 *Rules and regulations — Filing — Publication.* Rules, regulations, and orders made by the commission shall be filed with the director and published in a legal newspaper

in the cities of Wenatchee and Yakima within five days after being made, and shall become effective five days after filing and publication.

15.24.180 *Enforcement.* All county and state law enforcement officers and all employees and agents of the department shall enforce this chapter.

15.24.190 *Nonliability of state, members, employees.* The state shall not be liable for the acts of the commission or on its contracts. No member of the commission or any employee or agent thereof shall be liable on its contracts. All liabilities incurred by the commission shall be payable only from the funds collected hereunder.

15.24.200. *Penalties.* Any person who violates or aids in the violation of any provision of this chapter shall be guilty of a gross misdemeanor, and any person who violates or aids in the violation of any rule or regulation of the commission shall be guilty of a misdemeanor.

15.24.210 *Prosecutions.* Any prosecution brought under this chapter may be instituted in any county in which the defendant or any defendant resides, or in which the violation was committed, or in which the defendant or any defendant has his principal place of business.

The superior courts are hereby vested with jurisdiction to enforce the provisions of this chapter and the rules and regulations of the commission issued hereunder, and to prevent and restrain violations thereof.

15.24.900 *Purpose of chapter.* This chapter is passed:

(1) In the exercise of the police power of the state to protect the public health, to prevent fraudulent practices, to promote the welfare of the state, and to stabilize and protect the apple industry of the state;

(2) Because the apple crop grown in Washington comprises one of the major agricultural crops of Washington, and that therefore the business of selling and distributing such crop and the expanding and protection of its market is of public interest;

(3) Because it is necessary and expedient to enhance the reputation of Washington apples in domestic and foreign markets;

(4) Because it is necessary to discover the health giving qualities and food and dietetic value of Washington apples, and to spread that knowledge throughout the world in order to increase the consumption of Washington apples;

(5) Because Washington grown apples are handicapped by high freight rates in competition with eastern and foreign grown apples in the markets of the world, and this disadvantage can only be overcome by education and advertising;

(6) Because the stabilizing of the apple industry, the enlarging of its markets, and the increasing of the consumption of apples are necessary to assure the payment of taxes to the state and its subdivisions, to alleviate unemployment within the state, and increase wages for agricultural labor;

(7) To disseminate information giving the public full knowledge of the manner of production, the cost and expense thereof, the care taken to produce and sell only apples of the finest quality, the methods and care used in preparing for market, and the methods of sale and distribution to increase the amount secured by the producer therefor, so that they can pay higher wages and pay their taxes, and by such information to reduce the cost of distribution so that the spread between the cost to the consumer and the amount received by the producer will be reduced to the minimum absolutely necessary;

(8) To protect the general public by educating it in reference to the various varieties and grades of Washington apples, the time to use and consume each variety, and the uses to which each variety should be put.

15.24.910 *Liberal construction.* This chapter shall be liberally construed.

15.24.920 *Severability, chapter* 240, *Laws of* 1967.

(Legislative history, collateral references and cross references omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing.)

MEMORANDUM ORDER

(Filed 31 December 1975)

This action seeks to declare unconstitutional and to enjoin North Carolina General Statutes, Section 106-189.1 (1975), a statute of statewide application. On plaintiff's motion, the action was certified as requiring a three-judge panel and such a panel has now been designated. Pending at the time of certification was defendants' motion to dismiss the action for lack of either standing of the plaintiff to bring the action or the necessary jurisdictional amount. Upon defendants' request and with consent of the plaintiff given in open court, the motions were heard by the under-

signed Judge sitting alone. The court is satisfied that decision on the motion does not require consideration by the full three-judge panel. *Gonzalez v. Employees' Credit Union,* 419 U.S. 90 (1974); *Jacobs v. Tawes,* 250 F.2d 611 (4th Cir. 1957).[1]

The statute in question provides in effect that closed containers of apples intended for trade in North Carolina markets shall not bear any agricultural grade designation other than the appropriate grade defined by the United States Department of Agriculture. Violations of the statute may be criminally prosecuted. Plaintiff asserts that the statute infringes certain constitutional rights guaranteed to it as an association and to the individual apple growers whose interests the association seeks to represent. Jurisdiction is alleged under 28 U.S.C. §§ 1331, 1343, 2201 and 2202. Jurisdiction was alleged under Section 1343 by the amended

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[1] Because of the number of recent developments in the law relating to stay of the hand of the federal courts in cases involving state criminal prosecutions, inquiry was made at the hearing of counsel whether either the plaintiff or any of the persons it seeks to represent were subject to prosecution under N.C.G.S. § 106-189.1(b), which is the criminal provision of the statute under attack. Plaintiff's counsel indicated that all persons represented by plaintiff were refraining from any activity which might generate a prosecution. Accordingly, the decisions of *Hicks v. Miranda,* 422 U.S. 332 (1975), and *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975), would not appear to require dismissal of the action. However, even if a prosecution is begun which would force reconsideration of abstention under the principles of *Younger v. Harris,* 401 U.S. 37 (1971), it is not clear whether such a motion would require consideration by the three judges. *Compare Idlewild Bon Voyage Liquor Corporation v. Epstein,* 370 U.S. 713 (1962), *with MTM, Inc. v. Baxley,* 420 U.S. 799, 805-807 (1975) (Concurring opinion). *See Steffel v. Thompson,* 415 U.S. 452, 457 n. 7 (1974). *But see Blount v. Mandel,* 400 F. Supp. 1190 (D.Md. 1975).

complaint, filed after the motion to dismiss and by consent, which added a substantive claim under 42 U.S.C. § 1983.

Additional facts necessary for resolution of the current motion are derived mainly from the complaint as amended and the appendices thereto. Counsel for all parties at the hearing indicated that the essential facts of the case are not seriously disputed, but that the controlling issues are ones of law. At any rate, for purposes of initially determining standing, the allegations of a complaint, especially where verified, are taken as true. *Warth v. Seldin,* 422 U.S. 490, 501-502 (1975). And while plaintiff bears the burden of sustaining the court's jurisdiction by demonstrating the necessary amount in controversy, the burden is met unless it appears to a legal certainty that the claim is less than the jurisdictional amount. *Jones v. Landry,* 387 F.2d 102 (5th Cir. 1967).

Plaintiff Washington State Apple Advertising Commission is an agency and corporate body created by legislative act of the State of Washington. Rev. Code of Wash., Ch. 15.24 (1967) (hereinafter referred to as "Code"). It has the power to sue and be sued (defendants concede the Commission's capacity to sue), *Code* § .070(8). Its officers are actual growers or producers of apples grown in Washington, and are elected by district by other growers and dealers. *Code* §§ .030, .040. The Commission is charged with the responsibility to ". . . do all things necessary to effectuate the purposes of this chapter." *Code* § .070(2). Although there are eight expressed purposes given for the creation of the Commission, all of which have some relation to the case, there are two such purposes which are of interest sufficient to warrant quotation:

> "This chapter is passed:
>
> . . . "(7) To disseminate information giving the public full knowledge of the manner of production, the cost and expense thereof, the care taken to produce and sell

only apples of the finest quality, the methods and care used in preparing for market, and the methods of sale and distribution to increase the amount secured by the producer therefor, so that they can pay higher wages and pay their taxes, and by such information to reduce the cost of distribution so that the spread between the cost to the consumer and the amount received by the producer will be reduced to the minimum absolutely necessary;

"(8) To protect the general public by educating it in reference to the various varieties and grades of Washington apples, the time to use and consume each variety, and the uses to which each variety should be put." *Code* § .900(7)(8).

The Commission is not a voluntary membership organization as such, but is financed by mandatory assessments levied on all apples produced in the state. *Code* § .100.

The grade and inspection systems referred to in the above-quoted sections are in addition to grading and inspection systems established by the United States Department of Agriculture. That is, the Washington State Department of Agriculture maintains its own grading and inspection system which is separate and apart from the United States system, although the two programs are apparently comprehensive and jointly administered. Plaintiff alleges that the Washington State grade is superior to the United States grade and enjoys a favorable recognition in the apple trade which gives Washington apples a distinct competitive advantage. However, under the statute here under attack, N.C.G.S. § 106-189.1, Washington State grade cannot appear on closed containers of apples shipped into North Carolina.

The apple industry of the State of Washington is substantial, and according to the complaint, in excess of $1,250,-000.00 worth of Washington-grown apples were shipped,

either directly or indirectly, into North Carolina during the crop year 1974. The plaintiff during that crop year spent over $25,000.00 in North Carolina for advertising and trade promotion. According to legislative scheme, the amount of assessments flowing to the plaintiff annually depends on the total production by Washington apple growers during the crop year. For 1974, these assessments totaled almost two million dollars.

Plaintiff alleges that the prohibition of marking Washington State grades on closed containers has decreased the flow of Washington apples to North Carolina, and as to those still shipped into the state, such shipping has been at the expense of First Amendment rights of both the Association and the individual growers and shippers and in restraint of free-flowing interstate commerce. It is further alleged that certain sums of money have been expended to eradicate Washington State grade designations from pre-built containers in order to comply with North Carolina law.

On the basis of the above facts accepted only for purposes of defendants' motion to dismiss, the court holds that the plaintiff Association has standing to assert all the claims presented in the complaint, both those interests clearly belonging to the Association itself and those belonging to the various individual growers and producers of the State of Washington. The court further holds that there exists the necessary amount in controversy. Accordingly, the defendants' motion to dismiss must be denied and the case must be heard on the merits before the three-judge panel.

The developments of the law of standing were fully treated in Justice Powell's opinion writing for the majority in *Warth v. Seldin, supra,* at 498-510. There would be no purpose served by repeating the statements contained in Parts II, III and IV of that opinion; however, Part V is of particular significance since it relates to standing of associations to assert constitutional claims. *Id.* at 510-517. Pro-

vided the "case or controversy" requirement is met, *U.S. Const.*, Art. III § 2, as it clearly is here, an association may have standing either solely as representative of its members or as an association asserting its own rights, in which posture it may additionally assert the rights of its members so long as the claims relate to those matters fundamental to the membership of the individuals. *Id.* at 511. If joinder of each individual member is not necessary to the fair adjudication of the controversy, then the association alone in its representative capacity may sue as long as any individual would have a justiciable controversy if brought in his own name. *Id.* Essentially, the question of standing focuses on the inquiry whether the putative plaintiff would directly benefit from any affirmative relief ordered to remedy the wrongs asserted in the complaint.

The court is persuaded that *W'arth v. Seldin, supra,* gives plaintiff a clear right to bring the current action in both its individual and representative capacities. The Association asserts clear independent injury of at least two types. First, to fail to challenge the ability to freely advertise on closed containers the Washington State grade would be in derogation of its statutory duty. *Code* §§ .070(2), .900(7) (8). Further, if the loss of established trade advantage, by loss of the right to advertise state grades, results in a reduced market for Washington State apples, thereby decreasing annual production, the assessments paid to the Association decrease accordingly.

Defendants strenuously argue that the Association cannot assert any rights in its representative capacity. If this position were maintained, perhaps the scope of the controversy would be limited. However, the position is untenable. Primarily, defendants rely on the fact that plaintiff is not a voluntary membership organization and, therefore, does not enjoy the benefit of prior cases recognizing associational standing. While this factual distinction does exist, it has

no legal significance. Not only was the plaintiff established for the very purposes of protecting the financial integrity of the individuals, thereby creating a statutory nexus between plaintiff and the individuals, but further any affirmative relief ordered to protect the asserted rights of the individuals would result in a direct and tangible benefit to the plaintiff as well. Accordingly, there is an assurance of the quality of adversary presentation called for by the "prudential" standing requirements. *W'arth v. Seldin, supra.*

A resolution of the standing issue in favor of the Association in both its capacities compels a decision in its favor on the jurisdictional amount requirement.[2] It does not appear beyond a legal certainty that less than $10,000, exclusive of interest and costs, is involved. Although no damages are sought, plaintiff seeks injunctive and declaratory relief to protect rights which in "good faith" are claimed to be worth in excess of the minimum jurisdictional amount. A failure to issue an injunction could well result in economic loss in excess of this amount. This possibility is all that is required. *Jones v. Landry, supra.*

Again, it is stated that the facts controlling defendants' motion to dismiss are accepted only for purposes of resolving that motion.

In sum, it is now

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[2] Of course, plaintiff in its amended complaint asserts a cause of action under 42 U.S.C. § 1983. Its jurisdictional counterpart, 28 U.S.C. § 1343, requires no minimum jurisdictional amount. However, defendants challenge on standing grounds the right of the Association to sue as a "person" within the protection of the statute. Such a motion suggests a possible merits determination which would be appropriately resolved by the full panel. *Hagans v. Lavine,* 415 U.S. 528 (1974). The issue is somewhat different than that when the governmental corporation is the defendant. *See, e.g., City of Kenosha, Wisconsin v. Bruno,* 421 U.S. 507 (1973).

ORDERED that:

1. Defendants' motion to dismiss is denied, and an answer shall be timely filed;

2. The motion for a preliminary injunction will be heard before the three-judge panel at 9:40 a.m. on February 6, 1976, in Courtroom No. 1, Seventh Floor, Federal Building, Raleigh, North Carolina.

3. Plaintiff shall have to and including January 20, 1976 to file its brief and supporting documents in favor of its motion;

4. Defendants shall have until February 2, 1976 to file opposing briefs and documents.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

December 30, 1975.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

ANSWER

(Filed 13 January 1976)

Defendants answering the Complaint of the plaintiff, say:

ANSWER TO FIRST CAUSE OF ACTION

1, 2, and 3. The allegations contained in paragraphs 1, 2, and 3 are denied insofar as they allege that the plaintiff has met the jurisdictional requirements for bringing this action and that N. C. G.S. 106-189.1 contravenes any right, constitutional or otherwise, which the plaintiff or the apple growers of Washington State may possess.

4. It is admitted that the plaintiff was created by the Washington Legislature. Defendants are without knowledge as to what specific functions it actually performs.

5. Defendants are without knowledge as to the matters alleged in paragraph 5 and therefore deny them.

6 and 7. The allegations contained in paragraphs 6 and 7 are admitted.

8. Defendants are without knowledge as to the accuracy of the allegations contained in paragraph 8 and therefore deny them. It is admitted, however, that the State of Washington is a substantial apple producing State and that Washington grown apples are regularly shipped into the State of North Carolina.

9. The allegations contained in paragraph 9 are denied except that it is admitted that the apples shipped into North Carolina in closed containers are required to show the U. S. grade.

10, 11 and 12. The allegations contained in paragraphs 10, 11 and 12 are denied.

13. The allegations contained in paragraph 13 are denied except that it is admitted that the defendants have maintained that they would enforce the laws of the State of North Carolina.

14, 15, 16, 17, 18 and 19. The allegations contained in paragraphs 14, 15, 16, 17, 18 and 19 are denied.

ANSWER TO SECOND CAUSE OF ACTION

20. Defendants answer plaintiff's allegations contained in paragraph 20 (which reallege paragraphs 1 through 18 of plaintiff's First Cause of Action by incorporating by reference paragraphs 1 through 18 of their Answer to First Cause of Action.

21. The allegations contained in paragraph 21 of the Complaint are denied.

WHEREFORE, the defendants pray:

1. That plaintiff's request for an injunction to enjoin enforcement of N. C. G.S. 106-189.1 be denied;

2. That the Court find and declare that N. C. G.S. 106-189.1 is a valid and constitutional statute enacted pursuant to the police power of the State of North Carolina.

3. That the defendants have and recover the cost of court and such other relief as the Court shall deem just and equitable.

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(Certificate of service omitted in printing)

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF C. W. SCHULKE
IN SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY RESTRAINING ORDER

(Filed 26 January 1976)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

C. W. SCHULKE, being first duly sworn on oath, deposes and says:

1. I am Director of Marketing of the Wenatchee-Okanogan Cooperative Federation, known as "Wenoka Sales", and as such direct the sales of approximately 4,-000,000 packed boxes of Washington apples annually. Wenoka Sales consists of eight member cooperative units, each of which is composed of individual apple growers and has its own apple packing and storage facilities, and represents approximately 11-12% of the entire annual crop of Washington apples shipped fresh in closed containers. Wenoka Sales is not only the largest single marketing agency in the State of Washington for Washington State fresh apples sold in closed containers, but is the largest such marketing agency for fresh apples in the United States.

2. In addition to my position of Director of Marketing of Wenoka Sales, I am a former Chairman of the Grade and Pack Committee of the Washington State Horticultural Association, which committee is charged with the responsibility of developing grade standards for Washington State

apples and recommending promulgation to the industry at large and the Director of Agriculture of the State of Washington. I also own a producing apple orchard in the State of Washington.

3. The industry practice in the State of Washington is to order carton shipping containers of one bushel capacity each for packed apples well in advance of the harvesting season, preprinted with the appropriate variety and grade. In order to ship packed apples in closed containers bearing the Washington State grade into the State of North Carolina in compliance with the North Carolina statute, it has been necessary to obliterate the Washington State grade and substitute the comparable U. S. grade. The cost of obliteration and substitution is between five cents and fifteen cents per box, depending on the number of obliterations and re-marking required per box and the amount of handling thereof. Because of this inconvenience and expense and the resultant mutilated appearance of the apple container, Washington State growers in increasing numbers have been forced to abandon preprinting the apple container with the Washington State grade and are instead either preprinting it with the U. S. grade or are foregoing preprinting and resorting to the more expensive, slower hand stamping of the container with the appropriate U. S. grade if the container is destined for North Carolina.

4. Washington State grade standards have historically required a higher intensity of color for comparable grades and varieties over the U. S. grade standards and said Washington State grade standards in every respect do equal or exceed the comparable standards for U. S. grades.

5. At least three of the eight Wenoka Sales units have refused to sell and ship apples to North Carolina in closed containers bearing the Washington State grade because of the burdensome requirements of the North Carolina statute

requiring obliteration and re-marking. In addition, many purchasers of Washington apples in North Carolina have refused to purchase Washington apples in closed containers bearing the Washington State grade because of the expense and nuisance of obliterating the Washington grade and re-marking the container with the comparable U. S. grade on arrival. In both cases, North Carolina purchasers object to the mutilated appearance of the container after the obliteration and re-marking and resultant lessened market acceptability. Inevitably, the additional cost imposed upon North Carolina wholesale purchasers in being required to obliterate the Washington State grade and re-mark the closed containers with the appropriate U. S. grade must be recovered by them and is passed on as an extra burden to the North Carolina retail consumer.

6. One of the most serious problems caused by the North Carolina statute relates to trans-shipments into North Carolina from surrounding out-of-state regional distribution points to which Washington State apples are shipped. For example, a shipment of one or more cars of Washington State apples is made to a regional distribution center of a chain store, cooperative or other group purchaser, and from that point the shipment is broken into small lots and shipped to various ultimate destinations, including points within North Carolina. Such distribution points include Norfolk, Virginia; Richmond, Virginia; Roanoke, Virginia; Spartanburg, South Carolina; Columbia, South Carolina; and Atlanta, Georgia. When Washington State apples are shipped to these distribution points, there is no way of knowing how many, if any, are destined by the purchaser for ultimate distribution and sale within the State of North Carolina and consequently, Washington State apple growers and shippers do not know on this type of shipment how many, if any, of the closed containers of Washington State apples require remarking or must in the first instance be marked only with a U. S. grade. As a result, the ultimate consignee within

North Carolina must obliterate the Washington State grade from Washington State containers and re-mark them with the appropriate U. S. grade or insist on the containers being marked only with the U. S. grade in the first instance. This further adds to the burden imposed upon North Carolina wholesalers and on the orderly marketing process of Washington State apples in interstate commerce. At least 30% to 40% additional Washington State apples are transshipped in this manner into North Carolina as are sold directly in North Carolina in the first instance.

7. Washington State apples, graded to the specified Washington State standards, have a superior trade acceptance in the markets of the United States over apples graded to the required U. S. Standards, principally because of the requirements for higher density of color under Washington State standards, and as a result thereof, apples graded to Washington State standards bring a higher net return to the Washington State apple growers.

8. In marketing apples in closed containers in North Carolina, as well as other states, the initial sale is made directly to the wholesaler or to the wholesale department of larger retailers such as the chain stores. In either case, before the apples are placed in retail sale channels they are first removed from the closed container and displayed for retail sale loose in display cases and in some instances in transparent bags or on trays with a transparent overwrap. The original closed shipping container, which has been preprinted with variety and grade, does not go into retail sale channels and is not exhibited to the retail consumer. The grade markings thereon are only a meaning to the wholesale purchaser, who is an expert and knowledgeable in the field of wholesale purchasing of apples.

9. The requirements of the North Carolina statute have disrupted the orderly marketing process of Washing-

ton State apples in closed containers bearing the Washington State grade into North Carolina and adjoining states and have placed Washington State apple growers and shippers in the position of being required to do one of the following:

(a) Obliterate the Washington State grade on those containers with such preprinting and re-mark the same with a comparable U. S. grade, thus giving the box a mutilated appearance.

(b) Abandon the use of the Washington State grade and preprint apple containers with only the U. S. grade.

(c) Forego the economies and convenience of preprinting containers with the appropriate grades and instead resort to the expensive, obsolete and slower method of hand marking.

10. North Carolina is the only state in the union and the only place in the world which prohibits the display of the Washington State grade on closed containers of Washington State apples.

C. W. SCHULKE

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 26 January 1976)

(The affidavits of Thomas R. Morris and W. L. Kyle are identical with the exception of the identifying paragraphs

and differences in paragraph 8; also, Mr. Kyle's affidavit includes a paragraph 9, as follows):

THOMAS R. MORRIS, being first duly sworn, deposes and says:

My name is Thomas R. Morris. I am engaged in the purchase and sale of apples as a wholesaler. I have been so engaged for not less than 40 years. My business address is State Farmers Market Street, Columbia, State of South Carolina 20201.

My name is W. L. Kyle. I am engaged in the purchase and sale of apples as a Broker. I have been so engaged for not less than 30 years. My business address is 200 Patterson Avenue Street, Winston-Salem, State of North Carolina 27102.

1. Throughout the years during which I have purchased apples for the conduct of my business, it has been my experience and my personal observation that apples bearing the Washington State grade have a higher degree of consistency, uniformity and dependability than do apples bearing the comparable United States grade. Therefore, I prefer to purchase apples bearing the Washington State grade rather than apples bearing only the United States grade and those apples with the Washington State grade have a superior trade acceptance with me.

2. As I have stated, not only am I a buyer of apples, but I am a seller of apples as well. Over the years, it has been my experience and my personal observation that apples bearing the Washington State grade are more readily marketable by me and have a superior trade acceptance with those to whom I sell than do apples bearing only the United States grade.

3. In the course of my business I have frequent contact with others who are similarly situated in the buying and selling of apples in competition with me and in other areas where we are not in competition. I find from my association and contact with those people in the course of my business that the great majority of them likewise prefer to buy on the basis of the Washington State grade rather than the United States grade and find that the Washington State grade has superior acceptance with their customers than does the United States grade.

4. I am aware of the fact that apples shipped in containers bearing the Washington State grade are inspected by Federal or Washington State inspectors who determine prior to shipment that those apples meet the specifications of the Washington State grade placed on the container. I have found in my experience that apples shipped in containers bearing the Washington State grade do in fact meet the standards of that grade and therefore I rely upon the Washington State grade as placed on the container.

5. It has been my experience that apples purchased by me which are produced outside of the State of Washington and which carry United States grade on their container are not customarily inspected by either Federal or State inspectors prior to shipment to determine whether they do in fact meet the United States grade standard as shown on the container and on numerous occasions I have, therefore, purchased such apples which, in my opinion, did not meet the standards of the United States grade shown on their container. Because of this, when purchasing apples from other states which do not bear the Washington State grade, I rely primarily upon my opinion of the individual shipper rather than the United States grade under which the apples are shipped.

6. As a buyer of apples in closed shipping containers I would not be confused in any way by the container bearing

both a Washington State grade and a U. S. grade. The purchase of apples in closed shipping containers is normally and generally done by wholesale produce brokers and distributors or by the produce buyers for food store chains or groups of independent food stores. In my experience, such buyers are knowledgeable in both the Washington State and U. S. grades and would not be confused by shipping containers bearing both the Washington State and U. S. grades, but on the contrary, would be better informed as to the quality of the apples by knowing the Washington State grade in addition to the United States grade.

7. Apples are not sold at retail to the consuming public in their shipping containers.

Paragraph 8 from Mr. Morris' affidavit:

8. In addition to purchasing Washington State apples for distribution in my immediate business area, I purchase substantial quantities of Washington State apples which are resold in other states, including North Carolina. When I purchase such apples, I do not then know which of them will be resold in North Carolina. Consequently, in all such trans-shipments to North Carolina, the Washington State grade on shipping containers must first be obliterated and a United States grade substituted. This procedure is inconvenient, costly and give the container a mutilated appearance.

Paragraphs 8 and 9 from Mr. Kyle's affidavit:

8. Until several years ago, Washington State apples purchased by me during the years I have been in the business, bore the Washington State grade on the shipping container and only that grade.

9. Since Section 189.1 of chapter 106 of North Carolina General Statutes (G.S. 106-189.1) went into effect one of my major apple shipper from Washington State has re-

fused to ship into North Carolina because of the burden placed upon him. This has caused me as a broker to loose the sale of twenty carloads of Washington apples per year.

This 19th day of January, 1976.

s/ Thomas R. Morris

This 23rd day of January, 1976.

s/ W. L. Kyle

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 26 January 1976)

(The affidavits of J. L. Morgan and Donald Ford are identical with the exception of the identifying paragraphs as follows):

J. L. MORGAN, being first duly sworn, deposes and says:

My name is J. L. Morgan. I am engaged in the purchase and sale of apples as a Retailer. I have been so engaged for not less than 40 years. My business address is 2014 Fairview Road Street, Raleigh, State of North Carolina 27608.

My name is Donald Ford. I am engaged in the purchase and sale of apples as a wholesaler. I have been so engaged for not less than 30 years. My business address is State Farmer's Market Street, Raleigh, State of North Carolina 27604.

1. Throughout the years during which I have purchased apples for the conduct of my business, it has been my experience and my personal observation that apples bearing the Washington State grade have a higher degree of consistency, uniformity and dependability than do apples bearing the comparable United States grade. Therefore, I prefer to purchase apples bearing the Washington State grade rather than apples bearing only the United States grade and those apples with the Washington State grade have a superior trade acceptance with me.

2. As I have stated, not only am I a buyer of apples, but I am a seller of apples as well. Over the years, it has been my experience and my personal observation that apples bearing the Washington State grade are more readily marketable by me and have a superior trade acceptance with those to whom I sell than do apples bearing only the United States grade.

3. In the course of my business I have frequent contact with others who are similarly situated in the buying and selling of apples in competition with me and in other areas where we are not in competition. I find from my association and contact with those people in the course of my business that the great majority of them likewise prefer to buy on the basis of the Washington State grade rather than the United States grade and find that the Washington State grade has superior acceptance with their customers than does the United States grade.

4. I am aware of the fact that apples shipped in containers bearing the Washington State grade are inspected by

Federal or Washington State inspectors who determine prior to shipment that those apples meet the specifications of the Washington State grade placed on the container. I have found in my experience that apples shipped in containers bearing the Washington State grade do in fact meet the standards of that grade and therefore I rely upon the Washington State grade as placed on the container.

5. As a buyer of apples in closed shippiag containers I would not be confused in any way by the container bearing both a Washington State grade and a U. S. grade. The purchase of apples in closed shipping containers is normally and generally done by wholesale produce brokers and distributors or by the produce buyers for food store chains or groups of independent food stores. In my experience, such buyers are knowledgeable in both the Washington State and U. S. grades and would not be confused by shipping containers bearing both the Washington State and U. S. grades, but on the contrary, would be better informed as to the quality of the apples by knowing the Washington State grade in addition to the U. S. grade.

6. Apples are not sold at retail to the consuming public in their shipping containers.

7. Until several years ago, Washington State apples purchased by me during the years I have been in the business, bore the Washington State grade on the shipping container and only that grade.

This the 22nd day of January, 1976.

s/ Donald Ford

s/ J. L. Morgan

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 2 February 1976)

(The affidavits of Curtis F. Tarleton and Charles Elks are identical except that the identifying paragraph of the Elks' affidavit identifies him as Assistant Director of the Division of Markets, N. C. Dept. of Agriculture.)

The undersigned, first being duly sworn, deposes and says:

1. That he is Curtis F. Tarleton, Director of the Division of Markets, North Carolina Department of Agriculture, and that he has personal knowledge about the matters contained herein.

2. N. C. Gen. Stat. §106-189.1 was enacted by the General Assembly in 1971 and amended in 1973 to read as follows:

> Apples marked as to grade; penalty. — (a) All apples sold, offered for sale or shipped into this State in closed containers shall bear on the container, bag or other receptacle no grade other than the applicable U. S. grade or standard or the marking "unclassified," "not graded" or "grade not determined."
>
> (b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than fifty dollars ($50.00). Each day on which ap-

ples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

3. N. C. Gen. Stat. §106-189.1 is part of Article 17 of the General Statutes, which Article is entitled "Marketing and Branding Farm Products". The purpose of the Article is set forth in N. C. Gen. Stat. §106-185 as follows:

> Establishment of standard packages, etc., authorized. — The purpose of this Article is to give authority to investigate marketing conditions and to establish and maintain standard grades and packages and State brands for farm and horticultural crops and animal products. The term "farm products" as used hereafter in this Article shall be construed to mean any or all of the crops or products named above in this section.

4. Enactment of N. C. Gen. Stat. §106-189.1 was actively supported by the North Carolina Department of Agriculture.

5. N. C. Gen. Stat. §106-189.1 promotes uniformity in the grading of apples sold, offered for sale, or shipped into North Carolina and helps to eliminate confusion among the buyers and sellers of apples.

6. Prior to the enactment of N. C. Gen. Stat. §106-189.1, apples were being shipped into North Carolina and sold with the same indicative grade terms (E.g., Extra Fancy, Fancy, etc.) being used on apples of entirely different quality.

7. A large number of states ship apples into North Carolina. The following states ship apples into North Carolina:

Delaware
Georgia

Idaho
Maryland
Michigan
New Jersey
New Hampshire
New York
Oregon
South Carolina
Virginia
Washington
West Virginia

8. Of the states which ship apples into North Carolina, the following have state apple grading standards:

Idaho
Michigan
New York
Oregon
Virginia
Washington
West Virginia

9. There are a number of additional states which have state apple grading standards which are not currently shipping apples into North Carolina on a regular basis. They include:

Colorado
Illinois
Missouri
New Jersey
Ohio
Utah

10. There is no uniformity among the apple grading standards of the various states which have state grading standards.

11. At the time N. C. Gen. Stat. §106-189.1 was enacted, Washington State grades were not equal to U. S. Grades even though the same indicative terms (E.g., Extra Fancy, Fancy, etc.) were utilized.

12. Washington State apple grading standards were revised and made equal to the U. S. grading standards effective September 1, 1974. The affiant is informed and believes, and therefore alleges upon information and belief, that the Washington standards were changed in anticipation of plaintiff's court challenge to N. C. Gen. Stat. 106-189.1.

13. The Washington State apple grading standards may be revised at any time by the Washington State Department of Agriculture without the necessity of legislative action.

14. Less than 1% of the annual Washington State apple crop is shipped into North Carolina.

15. The N. C. Department of Agriculture and other State agencies do not attempt to interfere in any manner whatsoever with the advertising of Washington-grown apples within the State of North Carolina.

16. Affiant states upon information and belief that the use by Washington apple growers and shippers of preprinted shipping containers with the grade preprinted represents only a small percentage of the total number of shipping containers used by such shippers and growers.

17. Affiant knows of no one refusing to ship apples to North Carolina because of N. C. Gen. Stat. 106-189.1 and knows of no one refusing to buy Washington-grown apples, so long as they were marked in accordance with the law.

18. Prior to enactment of N. C. Gen. Stat. §106-189.1, many substandard apples were shipped into North

Carolina and sold with state grade markings which indicated they were of a better grade than was actually the case. These included apples marked with Washington State grades.

19. The quality of apples shipped into North Carolina has improved due to the enforcement of N. C. Gen. Stat. 106-189.1.

20. That N. C. Gen. Stat. §106-189.1 does not prevent a North Carolina buyer from purchasing apples which have been graded according to Washington standards, if he desires to do so. A North Carolina buyer can request that the apples be graded in Washington pursuant to Washington standards. Such apples would then be shipped into North Carolina in containers showing only the applicable U. S. Grade.

21. The use of state grading standards in grading fruit and produce other than apples is not a common practice. Of the various fruits and produce shipped into North Carolina, only Oregon pears are graded according to a state grade. The great majority of fruits and products shipped into North Carolina are graded by U. S. grading standards.

22. The N. C. Gen. Stat. §106-189.1 applies only to apples in closed containers. Apples in open containers are accessible to the purchaser and can be easily inspected by the purchaser to insure that he is getting the quality of apple he desires.

23. That prior to enactment of N. C. Gen. Stat. 106-189.1 the majority of apple shipping containers shipped into North Carolina from Washington State were handstamped with the applicable grade.

24. That at the present time, most apple shipping containers arriving in North Carolina from the State of Washington are handstamped with the variety and count, even when the grade is pre-printed on the carton.

25. That a substantial percentage of the apples shipped into North Carolina from Washington State are bagged in plastic bags which are shipped in closed shipping containers. Such apples are routinely offered for sale to the consuming public in the plastic bags. The quantity of apples shipped in this manner appears to be on the increase.

26. Federal law prohibits the shipment in interstate commerce, of improperly branded fruit and produce. Violations which are discovered by North Carolina inspectors are reported to the U. S. Department of Agriculture for appropriate action.

Dated: 29 January, 1976.

CURTIS F. TARLETON

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 2 February 1976)

The undersigned, first being duly sworn, deposes and says:

1. He is Lynwood Davenport, Federal Supervisor, Fresh Fruit Inspection, Agricultural Marketing Service, United States Department of Agriculture, and that he has personal knowledge of the matters contained herein.

2. In January of 1972, United States Secretary of Agriculture Earl L. Butz established a special team to study apple marketing problems and to recommend action that would benefit the apple industry. The study team consulted extensively with members of the apple industry and experts in State and Federal Governments in making its study. The team's report was submitted to Secretary Butz in August of 1972. The section of the report dealing with Grades and Standards is appended hereto and made a part hereof.

3. The report notes that:

"At present, 13 states have their own grades and standards for apples (footnote omitted), but only the State of Washington uses its grades extensively. The State grades are similar to USDA grades (footnotes omitted), *but there are variations in certain requirements, i.e., color, shape and russetting, which lead to confusion in trading. Elimination of State grades and adoption of U. S. grades would lessen confusion in trading at the wholesale and retail levels.*" (emphasis added).

4. The report made a number of recommendations. Of particular importance is recommendation number 4:

"State Grades. — There is a need for legislation in 13 states that would eliminate State grades for apples to lessen confusion in trading. (North Carolina amended its Apple Branding Law, effective July 1, 1972, to require all apples sold or offered for sale in closed containers in the State to bear on the container, bag, or other receptacle, the applicable U. S. grade or be marked "Unclassified," "Not Graded," or "Grade Not Determined." State grades do not comply with their branding regulations. Other states should be encouraged to have similar laws.)"

5. The United States Department of Agriculture has proposed establishing a uniform grade nomenclature for United States grades of fresh fruits, vegetables, nuts and other special products. Notice of the proposal was published in the Federal Register, Vol. 40, No. 194, a copy of which is attached hereto and made a p- -t hereof.

6. In its statement of considerations leading to the proposal, the U. S. Department of Agriculture noted the following:

(a) In January 1975 the General Accounting Office recommended to Congress that the Secretary of Agriculture "revise existing regulations to make grade designations more uniform and easier for consumers and industry to understand."

(b) The National Association of State Department of Agriculture has urged the Department to develop uniform grade names.

(c) Members of the 94th Congress have introduced legislation calling for uniform grade nomenclature.

(d) Trade journals have published articles pointing up the lack of uniform nomenciature.

7. The Department further notes that at present "there are 152 grade standards covering 82 fresh fruits and vegetables" and that there are "at least four different terms to describe the top grade for" those 82 fresh fruits, vegetables, nuts and other special products.

8. If the proposal is adopted, only the following grade names will be used:

U. S. Fancy, U. S. No. 1, U. S. No. 2, and U. S. No. 3.

Dated: 28 January, 1976.

LYNWOOD DAVENPORT

Lynwood Davenport

(Jurat omitted in printing)

[Attachment 1]

GRADES AND STANDARDS

Problem

The U. S. Standards for Grades of Apples were first promulgated in 1924. Since then, the standards have been revised or amended many times at the request of industry to reflect changes in the industry. Many people in the industry maintain that the standards should be further revised to better serve the needs of industry and reflect levels of quality desired by consumers.

Discussion

The U. S. Standards for Grades of Apples are promulgated by the Fruit and Vegetable Division of the Agricultural Marketing Service (AMS), specifically the Fresh Products Standardization and Inspection Branch. This branch is divided into two sections: (a) Inspection and (b) Standardization. The Inspection Section provides official inspection and grading services to shippers, processors, sellers, buyers (including other Government agencies), and other financially interested parties on a fee basis. Use of this service is voluntary (unless made mandatory by some other program or contract) and is available upon request.

The Standardization Section is responsible for developing standards and procedures for their application to aid growers and other segments of the fresh product industry in marketing their product. The standards provide a yardstick for measuring quality which forms a basis for satisfactory trading.

Most apple packers use the standards and inspection for quality control in packing to meet wholesale buyer requirements and to enable appropriate labeling for benefit of the consumer. At present, 13 States have their own grades and standards for apples, but only the State of Washington uses its grades extensively. The State grades are similar to USDA grades, but there are variations in certain requirements, i.e., color, shape, and russeting, which lead to confusion in trading. Elimination of State grades and adoption of U. S. grades would lessen confusion in trading at wholesale and retail levels.

Many people at the regional meetings commented that the U. S. Standards for Grades of Apples should be revised to:

1. Make condition part of grade;
2. Lower color requirements; and
3. Eliminate the U. S. No. 1 grade.

What would be the benefit of making condition part of grade? The U. S. Standards for Grades of Apples, along with the pear standards, are different in one respect from other (fresh fruit and vegetable) U. S. grade standards. In the apple and pear standards, decay and other factors developing after storage or transit are considered as affecting condition and not the grade (quality). (The Inspection Service general definition of quality and condition as they apply to fresh fruits and vegetables are as follows:

1. Quality — The inherent properties of a product which determine its relative degree of excellence.

2. Condition — The relative degree of soundness or preservation of a product and includes, but is not necessarily limited to, its firmness, decay, freezing or mechanical injury, shriveling, flabbiness, or any other factor which affects its merchantability.)

Factors of deterioration are not handled this way in grade standards for other products. For example, in the U. S. Standards for Peaches, decay, bruising, softness, and other factors subject to change are scored against grade along with permanent defects (those not subject to change) to determine the grade of the lot. At shipping point, a lot of peaches containing more than 1-percent decay but with permanent defects within tolerance would fail to grade U. S. No. 1 because the 1-percent tolerance for decay is exceeded. The lot would be certified as failing to grade U. S. No. 1 because of defects in excess of the tolerance or as containing a certain percentage of U. S. No. 1 quality, together with the percentage of decay or other serious condition defects. En route or at destination such a lot could have an additional 2-percent tolerance for decay; but if the decay tolerance were exceeded, the lot would be reported out of grade and certified as follows:

"Meets quality requirements but fails to grade U. S. No. 1 account of condition."

This procedure is followed in the case of grapes, cantaloups, onions, potatoes, lettuce, and all other fruits and vegetables for which there are grade standards, except apples and pears. Some of the standards provide increased tolerances en route or at destination; others do not.

Under the present apple standards, a lot of freshly packed apples containing decay or other condition defects in excess of the specified tolerances would fail to meet grade and would be certified out of grade or as containing a per-

centage of a given grade, e.g., 85 percent No. 1 quality. However, when apples are inspected after storage, en route, or at destination, and the lot contains excessive decay or other condition defects, it would be reported as meeting the specified grade, e.g., U. S. Extra Fancy, decay and scald being factors of condition. This would be the case even though the lot may contain *100* percent decay or other condition defects.

Some members of the industry maintain that condition should not be made part of grade until condition factors can be determined by objective methods. The truth of the matter is that all factors of condition scorable as defects, including overripe fruit, are readily detected and evaluated subjectively (with a high degree of accuracy) by the Inspection Service. If the standards were revised today, making condition part of grade, the Inspection Service could accurately interpret all condition defects. Presently, condition is part of grade in Canada (apple standards) and the system is working well.

Firmness is the only factor of condition which cannot be accurately determined by subjective means. There are five stages of firmness or ripeness: Hard, firm, firm ripe, ripe, and overripe. Overripe is considered a condition defect in the apple standards and the exact percentage found in a lot by the inspector is reported on the inspection certificate. The other degrees of firmness are not condition defects but are reported on the certificate in general terms to provide the reader with a picture of firmness (ripeness) of the lot. It is difficult, if not impossible, for inspectors to accurately separate degrees of firmness (hard to ripe) using present methods of determination. Accurate objective methods and indices must be developed.

If U. S. grade standards were revised to include condition as part of grade, the apples offered for sale at retail

should improve in condition. State departments of agriculture could also play a major role in improving condition of apples at retail levels by increased surveillance and enforcement of State branding laws. This means that containers or consumer packages marked with a grade would have to meet that grade or the handler would be in violation of the law and would be subject to a fine.

What would be the benefit of lowering color requirements in the grade standards?

Color requirements in the U. S. Standards for Grades of Apples specify shades of red color permitted in the grades and the minimum percentage of surface area that must be covered with it * * * It was mentioned at the regional meetings that emphasis on red color is detrimental to improving condition of fruit since growers tend to leave fruit on the trees longer to obtain maximum color; this practice often results in overripe fruit.

Relaxing color requirements for the grades by 10 percent would mean a higher percentage packout of Extra Fancy and Fancy apples which are likely to be in better condition. The fresh apple grower could realize more money for his crop if buyers would accept apples with less red color. Relaxation of color requirements would be especially helpful to growers in California, North Carolina, South Carolina, and Georgia, where climatic conditions make it difficult to obtain Extra Fancy and Fancy color.

Should the U. S. No. 1 grade be eliminated?

The U. S. No. 1 grade is the primary trading grade for many fresh fruits and vegetables but not apples. U. S. Fancy is the primary apple trading grade, although U. S. No. 1 apples are marketed extensively in some cities.

The basic differences between U. S. No. 1 and higher grades is color, russeting, and invisible water core. U. S. No. 1 apples may have less red color than higher grades and more russeting; visible water core is not scorable against U. S. No. 1, but is against higher grades.

Many industry people contend the No. 1 grade should be eliminated because the grower is fortunate to break even selling this quality fruit through regular fresh market channels. Roadside stands are a good and profitable outlet for No. 1 apples but less than 5 percent of commercial production is merchandised this way.

U. S. No. 1 apples are a good buy for many consumers who desire apples with less color and cosmetic appeal. If this grade were eliminated from the standards, two grades would be eliminated — U. S. No. 1 and Combination U. S. Fancy and U. S. No. 1. The best way to determine whether this change and other changes mentioned earlier should be adopted is for AMS to publish a draft for discussion to determine the desirability of revising the apple standards. This draft would receive full distribution to the industry for their overall views and comments.

* * *

What changes can be made in the apple grade standards that will benefit growers and consumers?

Solutions

1. *Immediate Action.* — Making condition part of grade should improve the condition of apples at retail and possibly increase demand through better satisfied consumers.

2. *Immediate Action.* — Reducing color requirements in apple standards for red varieties 10 percent should improve condition of fruit from the growing area on through

to the market. It would be easier for growers to meet the U. S. Extra Fancy and Fancy grades.

3. *Later Action.* — Develop grade requirements that emphasize degrees of quality based on external appearance (as in present standards) and eating quality. Research is needed to correlate eating quality to firmness, soluble solids, and appearance.

4. *Later Action.* — Require apples to be no further advanced than firm ripe at point of origin. This is currently being done by Canada. It would definitely improve fruit condition, and could be implemented when accurate methods of determining firmness are developed.

Recommendations

1. *Quality — U. S. Grades and Standards.* — There is a need to determine the desirability of revising the U. S. Apple Standards to better control quality. These standards are the responsibility of the Agricultural Marketing Service (AMS) of the USDA in cooperation with the apple industry. The team recommends that changes be made in the following areas:

a. Make condition part of grade by deleting paragraph 51.310 in the standards. With this change, decay, breakdown, and other deterioration developing on apples during storage or in transit would be scored against the grade, as is done for most other fresh produce. However, tolerances might be increased at destination. Concerning firmness, only overripe fruit would be scored against grade. This should improve the condition of apples offered for sale at retail and increase demand.

b. Eliminate the U. S. No. 1 grade and other lower grades that are rarely used. (Current standards contain nine grades, three of which are combination grades.)

c. Lower color requirements for red and red-striped varieties by 10 percent for Extra Fancy and Fancy grades.

d. Make additional changes to update and clarify the standards.

A draft with proposed changes would be prepared and would receive industry-wide distribution. All interested parties would be encouraged to submit written views and comments. Views and comments would be evaluated and desirable changes would be published under notice of proposed rulemaking in the Federal Register for public review and comments.

2. *CA Condition Standards.* — The USDA (AMS) in cooperation with industry should determine the desirability for establishing minimum national CA standards for condition.

3. *Maturity and Ripeness Indices.* — Objective methods and indices for determining immaturity and ripeness for commercially important varieties need to be developed. This type of research is needed immediately on a regional basis. (ARS, AMS, and State experiment stations.)

When accurate methods and indices are devised for measuring maturity and ripeness, U. S. Standards for Grades of Apples should be revised. This will require fruit at shipping point to be mature but no more advanced in firmness (ripeness) than firm ripe. (See paragraph 51.323 of current Standards.) Canadian standards now call for firm and firm-ripe maturity at time of shipment—riper fruit is classed as "local maturity" and is sold to local or nearby markets.

4. *State Grades.* — There is a need for legislation in 13 States that would eliminate State grades for apples to lessen confusion in trading. (North Carolina amended its Apple Branding Law, effective July 1, 1972, to require all

apples sold or offered for sale in closed containers in the State to bear on the container, bag, or other receptable, the applicable U. S. grade or be marked "Unclassified," "Not Graded," or "Grade Not Determined." State grades do not comply with their branding regulations. Other States should be encouraged to have similar laws.)

5. *State Branding Laws.* — State departments of agriculture should increase surveillance and enforcement of State branding laws, at the retail level, to keep off-quality produce from being sold.

6. *Processing Grades and Standards.* — The USDA (AMS), in cooperation with industry, should develop improved quality standards for apples for processing and processed apples, in particular apple juice.

(Footnotes omitted in printing)

[Attachment 2]

Proposed Rules

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[7 CFR Part 51]

FRESH FRUIT, VEGETABLES, NUTS AND OTHER SPECIAL PRODUCTS[1]

Proposed Grade Standards

Notice is hereby given that the United States Department of Agriculture is considering the issuance of policy on establishing uniform grade nomenclature for United States standards for grades of fresh fruits, vegetables, nuts and other special products (7 CFR § 51.100) pursuant to the Agricultural Marketing Act of 1946 (60 Stat. 1087, as amended; 7 U.S.C. 1621-1627), which provides for the issuance of official U. S. grades to designate different levels of quality for the voluntary use of producers, buyers and consumers. Official grading services are also provided under this act upon request of any financially interested party and upon payment of a fee to cover the cost of such services.

All persons who desire to submit written data, views or arguments for consideration in connection with the proposal should file the same in duplicate, not later than February 15, 1976, with the Hearing Clerk, U. S. Department of Agriculture, Room 112, Administration Building, Washington, D.C. 20250, where they will be available for public review during official hours of business (7 CFR § 1.27(b)).

[1] Packing of the product in conformity with the requirements of these standards shall not excuse failure to comply with the provisions of the Federal Food, Drug and Cosmetic Act or with applicable State laws and regulations.

Statement of considerations leading to the proposed issuance of policy on uniform grade nomenclature. For a number of years there has been interest and concern on the part of industry groups, some legislators, consumers and the Department in the variations in grade names used in the grade standards for fresh fruits and vegetables. In January 1975 the General Accounting Office recommended to Congress that the Secretary of Agriculture "revise existing regulations to make grade designations more uniform and easier for consumers and industry to understand." The National Association of State Departments of Agriculture has urged the Department to develop uniform grade names. Members of the 94th Congress have introduced legislation calling for uniform grade nomenclature for all foods and for mandatory grading and grade labeling. There have been several articles published in trade journals critical of grade standards, pointing up the lack of uniform nomenclature and the difficulties consumers encounter when they attempt to understand grade names on fresh fruits and vegetables.

The first fruit and vegetable grade standards established were for potatoes in 1917. Since then standards have been established for many commodities. At present there are 152 grade standards covering 82 different fresh fruits and vegetables. These grade standards are voluntary and were developed in consultation with representatives of producers, receivers and to some extent consumers, following three basic principles: (1) There must be a need for the standards; (2) There must be interest and support for the use of the standards; and (3) The standards must be practical to use. The lack of uniformity in the grade terminology has not always been a problem to those who used the standards.

In developing grade standards for a commodity the full range of quality produced is considered. The number of

grades provided depends to a large extent on the number of distinct gradations of quality that the industry makes and which is usually governed by the relative value of the product. When the Department first developed wholesale grade standards, U. S. No. 1 was the highest grade. It covered the majority of a crop produced and meant the product was of good quality. U. S. No. 2 represented the remainder of the crop that was worth packing for sale under marketing conditions. As work on the standards progressed, it was recognized that for some commodities two grades were not enough. So premium grades were added; the same grade nomenclature, however, was not used for all the various commodities.

In the present standards there are at least four different terms to describe the top grade for 82 fresh fruits, vegetables, nuts and other special products. U. S. Extra No. 1 (potatoes), U. S. Extra Fancy (apples), U. S. Fancy (oranges and grapefruit), U. S. No. 1 (onions) are a few examples. These are the commodities that are most likely to be grade labeled in retail stores. The situation becomes more complex when discussing second and third grades because U. S. No. 1 for example is the second grade for potatoes and the third grade for apples. Some standards provide an intermediate grade between U. S. No. 1 and U. S. No. 2 to describe quality not up to U. S. No. 1 requirements, but superior to U. S. No. 2 quality. The terms "U. S. Commercial" and "U. S. Combination" were adopted to describe this quality. "U. S. No. 3" designation is used only in a few standards to accommodate a lower quality for highly specialized products which lend themselves to separations into many quality gradations.

As the grade standards were developed or revised over the years, it was usually members of the particular commodity industry concerned, like the potato growers or shippers and the apple packers, who had most influence on what grade

terminology was selected. There are probably good reasons why the g ade terminology evolved that way. But as marketing becomes more complex it is much more important to have a system of simplified nomenclature that everyone can easily understand and use.

It is the industry's responsibility as well as the Department's to help consumers get the quality they desire. A simplified uniform grade nomenclature that consumers and everyone in the marketing system could understand would certainly help consumers get the quality they want.

In the past year, members of the Fruit and Vegetable Division of the Department have discussed with various people in the produce industry a proposal to establish uniform grade nomenclature for fresh fruits and vegetables. The proposal would establish the Department's policy to provide that when new U. S. grade standards for fresh fruits and vegetables are issued, or when existing grade standards are revised or amended, only the following grade names shall be used: U. S. Fancy, U. S. No. 1, U. S. No. 2 and U. S. No. 3.

The proposed new subpart shall read as follows:

Subpart — United States Standards for Grades of Fresh Fru ts, Vegetables, Nuts and Other Special Products

UNIFORM GRADE NOMENCLATURE

§ 51.100 *Uniform grade nomenclature.*

When new U. S. standards for grades of fresh fruits, vegetables, nuts and other special products are issued, or when existing grade standards are revised or amended, the following grade nomenclature shall be used.

Grade Name	*Definition*
U. S. Fancy	Premium quality; covers only the top quality range produced.
U. S. No. 1	The chief trading grade: represents good average quality that is practical to pack under commercial conditions; covers the bulk of the quality range produced.
U. S. No. 2	Intermediate quality between U. S. No. 1 and U. S. No. 3; noticeably superior to U. S. No. 3.
U. S. No. 3	The lowest merchantable quality practical to pack under normal conditions.

(Secs. 203, 205, 60 Stat. 1087, as amended, 1690 as amended; 7 U.S.C. 1622, 1624)

Dated: October 1, 1975.

Donald E. Wilkinson,

Administrator.

[FR Doc. 75—26726 Filed 10-3-75; 8:45 a.m.]

FEDERAL REGISTER, VOL. 40, NO. 194 — MONDAY, OCTOBER 6, 1975

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF HAROLD COZART

(Filed 2 February 1976)

HAROLD COZART, being first duly sworn on oath deposes and says:

1. That I am the General Manager for Blue Chelan, Inc., a co-operative producer and shipper of Washington grown apples. Blue Chelan account for approximately 2½% of all State of Washington apples shipped in interstate commerce.

2. After the adoption of G. S. 106-189.1, by the State of North Carolina, Blue Chelan was forced to obliterate the Washington State grade on shipments of apples which might terminate in or be diverted to North Carolina. The cost of this obliteration and special handling was prohibitive. Consequently, because Blue Chelan wanted to continue to sell apples in all states, including North Carolina, it was forced to abandon the showing of a preprinted Washington State grade on its shipping carton. Blue Chelan simply could not afford the extra expense of either maintaining a separate inventory of cartons to be shipped especially to the State of North Carolina or the expense of obliterating the preprinted Washington State grade.

3. Blue Chelan would prefer to ship apples exclusively under the Washington State grades. The Washington State Apple industry has spent approximately sixty years building the identity of its State grade. The Washington State grades have historically enjoyed a premium acceptance and

a quality image because of high standards and mandatory inspection. Conversely, the U. S. grades have not commanded the same respect in the fresh fruit market because of the lack of uniform mandatory inspection in the other 49 states and because they have a lower emphasis of color. Typically, lower quality apples are shipped under the U. S. grades. Blue Chelan believes that it would have an easier time selling its apples and could maintain a more stable price structure if we continue to ship under the Washington State grade. Finally, Washington State Grades are accepted world-wide as an identification synonymous with quality, we do not believe that a single state (there are now other states following North Carolina's lead) has the right to create an economic burden on the showing of the Washington State grades so as to effectively force us to abandon shipping under those grades.

DATED this 26th day of January, 1976.

HAROLD COZART

Harold Cozart

(Jurat omitted in printing)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

SUPPLEMENTAL AFFIDAVIT OF
C. W. SCHULKE

(Filed 2 February 1976)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

C. W. SCHULKE, being first duly sworn on oath, deposes and says:

* * *

2. In the ordinary process of Washington apples being delivered packed in the fresh market to the various states, they are of course first delivered loose to the various warehouses by the growers. Upon arrival, apples are first treated with various inhibitors to prevent mold and decay and are then placed in cold storage. As the marketing season progresses, this orchard run fruit is removed from cold storage, run over packing lines and graded and packed into bushel containers for subsequent shipment. The packed fruit is then marketed in an orderly manner throughout the entire marketing season, which season usually commences the early or middle part of September and terminates in July or early August of each year. Washington State fruit is held in cold storages pending packing and thereafter pending shipment, approximately one-third of which is controlled atmosphere storage. Controlled atmosphere storage is a special storage in which apples are held in an atmosphere containing not to exceed 5% oxygen. This permits the

apples to be held in a fresh condition for an unlimited period and apples so stored are still fresh and crisp even when removed from storage a year later.

3. Apples are shipped to the various states from Washington either by rail or truck. Shipments destined for North Carolina may either be shipped directly in carload or truckload lots, or part lots, or may arrive by way of trans-shipments from direct shipments to distribution points in one of the neighboring states of North Carolina. Shipments may be made directly to a wholesale distributor or jobber in North Carolina, who in turn resells to individual stores or to the major chain stores, or Washington apples may be in the first instance sold directly to the wholesale produce departments of chain stores or to associated or cooperative groups, which in turn distribute to the individual stores for ultimate sale to the individual consumers.

4. Washington apples are shipped in carton shipping containers, which normally contain one bushel of apples. This container is designed only for shipping purposes in interstate commerce and is not designed for use in the sale of apples to the retail consumer. The retail consumer normally buys apples loose on display trays in the individual stores or put up in consumer sized units of transparent plastic bags of usually three or four pounds, but in some instances ranging up to eight pounds, or in small tray packages with a transparent plastic overwrap, containing normally four to eleven apples, depending upon the size. In the normal course of retail sales to the retail consumer, apples are not sold from the shipping containers and apples are not normally displayed to the retail consumer in the original shipping containers.

5. The state of Washington furnishes approximately one-half of all apples shipped in interstate commerce for fresh consumption in the United States and by February 1 of each year approximately two-thirds of all apples on hand to be sold in the fresh markets of the United States are

apples grown in the state of Washington. The apple industry of the state of Washington ranks fourth agriculturally and makes a major economic contribution to the state. In addition, controlled atmosphere apple cold storages situate in the state of Washington account for nearly one-half of the total controlled atmosphere apple storage in the United States.

C. W. SCHULKE

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 2 February 1976)

My name is Richard N. Barber. I live in Waynesville, North Carolina. I have personal knowledge of those matters contained herein.

2. I am 69 years of age, and I have been in the business of growing, packing and shipping apples all of my life.

3. It has been my experience that the use of state grades in the marketing of apples creates confusion among all people in the marketing chain: Growers, Processors, Packers, Shippers, Brokers, Receivers, Jobbers, Retailers and Consumers.

4. N. C. General Statute 106-189.1 has been beneficial in reducing such confusion in the marketing of apples in North Carolina.

5. It has been my experience that the apple marketing reports compiled by the U. S. Department of Agriculture often do not designate whether the price quotations are for U. S. grades or state grades. This often causes confusion in the buying of apples because the buyer cannot be certain of the quality of the apples identified only as "Extra Fancy, Fancy", etc.

6. State grades can be used by brokers in such a manner as to harm growers shipping under U. S. grading standards. For example, a broker may say that he can purchase "Fancy" grade apples at $X.00 per bushel. He may be referring to a state grade "Fancy" which is not the same quality as a U. S. Fancy. The result is that the price for the better grade apples, U. S. Fancy, is driven down to be competitive with the state graded "Fancy" apples.

7. Enactment of N. C. General Statute 106-189.1 has forced North Carolina apple growers to improve the quality of apples they sell, since they have to meet U. S. grading standards.

8. I strongly prefer the use of U. S. grades in the grading of apples over the use of State grades.

Dated this 30th day of January, 1976.

RICHARD N. BARBER

Richard N. Barber

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 2 February 1976)

The undersigned, first being duly sworn, says:

1. My name is Charles Murray. I am the Manager of the State Farmers Market, Raleigh, North Carolina.

2. Prior to becoming Manager of the State Farmers Market in Raleigh, I was licensed by the United States Department of Agriculture as an inspector.

3. I have had extensive experience in the area of the inspection of fruit and produce.

4. It has been my experience that the use of state grades in the marketing of apples can cause confusion among buyers and sellers of apples.

5. The exclusive use of the U. S. grade for apples marketed in North Carolina serves to reduce confusion and deception in the marketing of apples.

CHARLES MURRAY

Charles Murray

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 3 February 1976 and 4 February 1976 [Lowe])

(The affidavits of Boyce Enloe, Everett Lutz, and Perry Lowe, Jr. are identical with the exception of the identifying paragraphs as follows):

(1.) My name and address are Mr. Boyce Enloe, Route 1, Box 304-A, Hendersonville North Carolina 28739. I have personal knowledge of the matters contained herein. (2.) I have been involved in the growing, packing, and shipping of apples for over 25 years.

(1.) My name and address are Mr. Everett Lutz, Route 3, Lawndale, North Carolina 28090. I have personal knowledge of the matters contained herein. (2.) I have been involved in the growing, packing, and shipping of apples for over 30 years.

(1.) My name and address are Mr. Perry Lowe, Jr., Route 2, Moravian Falls, North Carolina 28654. I have personal knowledge of the matters contained herein. (2.) I have been involved in the growing, packing, and shipping of apples for over 25 years.

3. It has been my experience that the use of state grades in the marketing of apples has often created confusion among people at all levels of the marketing chain, including brokers and wholesalers.

4. I prefer the use of the U. S. Grade in the grading of apples, and I believe that the exclusive use of the U. S.

Grade for apples marketed in North Carolina serves to reduce confusion and deception in the marketing of apples.

Dated this 31st day of January 1976.

s/ BOYCE ENLOE

Dated this 31st day of January 1976.

s/ EVERETT LUTZ

Dated this 30th day of January, 1976.

s/ PERRY LOWE, JR.

(Jurats omitted in printing)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

SUPPLEMENTAL AFFIDAVIT OF
JOSEPH T. BROWNLOW

(Filed 5 February 1976)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

JOSEPH T. BROWNLOW, being first duly sworn on oath, deposes and says:

1. * * * Prior to the adoption of the North Carolina statute G. S. §106-189.1, the North Carolina Board of

Agriculture had promulgated Regulation No. 324.5(6), reading in part as follows:

> "Apple containers must show the applicable U. S. grades . . . State grades shall not be shown . . ."

The Apple Commission petitioned the North Carolina Board of Agriculture to amend the regulation to permit the showing of Washington State grades. A hearing was held before the Board in North Carolina on March 19, 1973. No ruling on the petition ever was issued by the Board of Agriculture because shortly following the hearing North Carolina General Statute §106-189.1 was introduced and passed by the North Carolina General Assembly, which statute incorporated the foregoing provisions of the Board of Agriculture regulation.

2. At the hearing before the Board of Agriculture, the North Carolina apple industry presented the United States Department of Agriculture "Apple Marketing Report, a Team Study". This report is an apple marketing report consisting of 108 pages discussing matters of supply, quality, marketing efficiency, domestic demand and foreign trade with respect to the apple industry, both fresh and processing, and only in passing makes brief reference to elimination of State grades on closed containers of apples and the showing of U. S. grades only. Following the hearing, because of what I regarded as a very one-sided, biased report introduced at the hearing under the signature of Robert W. Bohall, an employee of the U. S. Department of Agriculture in the Economic Research Service Department, I wrote a letter to Secretary Earl L. Butz, of the United States Department of Agriculture, dated April 17, 1973. Subsequently on May 16, 1973, I received a reply from Clayton Yeutter, Assistant Secretary of the United States Department of Agriculture. Assistant Secretary Yeutter was then in charge of all marketing and consumer services

for the United States Department of Agriculture, and the activities of the Study Report referred to were conducted under his general supervision and as a part of his area of responsibility. Particular attention is called to the following statements in his letter:

> "As was pointed out, the Team reports represented advice to the Secretary and do not represent the official policy of the U. S. Department of Agriculture. It is the feeling of the Department that the matter of grades should be resolved within the apple industry. *Meanwhile, we do not propose to take any action which would lead to the elimination of State grades for apples in those States where the apple industry believes them to be of value.*" (Emphasis supplied.)

The letter concluded with the following statement:

> It would have to be concluded that with *both the Federal and State grades upon the container*, the quality problem would be eliminated. *We certainly appreciate your desire to maintain Washington State apple grades, particularly when they are well established.*" (Emphasis supplied.)

Copies of both letters are attached hereto.

No regulation ever has been adopted or official action taken by the United States Department of Agriculture requiring the showing of only U. S. grades on containers of apples in interstate commerce or the elimination of State grades on such containers.

3. The reason the Washington State grade enjoys such a premium reputation in the market is because of the requirement of its mandatory inspection system at the point of shipment and the consistency and dependability of its grade as a result thereof. No such inspection is required

prior to shipment of apples in interstate commerce from any state in the Union other than the State of Washington under either the U. S. grade or under the State grade of any other state. This mandatory inspection requirement of Washington State apples costs the apple growers of the State of Washington approximately two and one-half cents per box and for the 1975 apple crop of approximately forty million boxes will cost the Washington State apple growers approximately $1,000,000.00. This per box investment is made each year by the Washington State apple growers in order to continue to maintain their grade at its present high level of consistency and dependability. The apple growers of no other state so discipline themselves in order to maintain uniform standards of quality or make this compulsory investment in inspection to insure consistency of high quality in interstate apple trade.

4. Historically, the Washington State grade has always been superior to the U. S. grade in the matter of requirement of a higher intensity of color and uniform interpretation of color requirement. In some other areas, the standards for the Washington State grade and the U. S. grade differ. In an effort to eliminate the North Carolina problem, the apple industry of the State of Washington in 1973 and 1974 held numerous meetings and hearings throughout the industry and, effective September 1, 1974, revised its grade standards to equal or exceed the U. S. grade in every respect, and such standards are now in effect. In my prior affidavit dated September 9, 1975, I set forth correspondence with North Carolina Department of Agriculture Commissioner James A. Graham and my efforts with him to allow the showing of the Washington State grade, because the Washington grade standards had then been revised to equal or exceed U. S. standards.

5. Washington State contains approximately one-half of the controlled atmosphere capacity of the United States. Controlled atmosphere storage of apples is specifically described in the Team Study Report on page 40 and makes specific reference to Washington State, as follows:

> "However, Washington State is the only State that has a fruit condition requirement as part of its Controlled Asmosphere Storage Requirements . . ."

and quotes the Washington law. For this segment of its total volume of apples in interstate commerce, namely approximately one-third, the State of Washington has also been a pioneer and leader in the field. A copy of page 40 of said report is attached hereto and made a part of this affidavit.

JOSEPH T. BROWNLOW

(Jurat and Exhibit 2 omitted in printing)

[Exhibit 1]

DEPARTMENT OF AGRICULTURE

Office of the Secretary
Washington, D. C. 20250

May 16, 1973.

Mr. Joseph T. Brownlow, Manager
Washington Apple Commission
Post Office Box 18
Wenatchee, Washington 98801

Dear Mr. Brownlow:

We appreciate your concern and comments expressed in your letter to Secretary Butz, April 17, 1973, with respect to

the recommendations of the Apple Marketing Study Team. As I indicated in a letter to Mr. Falk, March 2, 1973, Dr. Bohall was appropriately permitted to express the views of the Apple Marketing Study Team as part of the Department's commitment to follow up on all five team reports and to assist the apple industry to coming to grips with its problems. As was pointed out, the team reports represented advice to the Secretary and do not represent the official policy of the U. S. Department of Agriculture. It is the feeling of the Department that the matter of grades should be resolved within the apple industry. Meanwhile we do not propose to take any action which would lead to the elimination of States grades for apples in those States where the apple industry believes them to be of value.

The Apple Marketing Team recommended that "State legislation is needed in 13 States that would eliminate State grades for apples to lessen confusion in trading" after considering the comments of all segments of the apple industry and the economic implications for the total apple industry. The issues as the team saw it were two. One, the confusion in trading that would be caused by a proliferation of State grades; and two, the cost of economic salvage if apples marketed under State grades are of inferior quality and as a result lower consumer confidence in the product. The suggestion to eliminate State grades was mentioned most frequently to the team in Appalachia but similar comments were made in other production regions in the Eastern and Central States and received some support in the Northwest. It is also our understanding that the team did have contact with members of the wholesale and retail trade and this same suggestion was mentioned by members of the apple industry at this level of marketing. It is also our understanding that at the informal meeting with retailers the same suggestion was indeed made.

It is also our understanding that the marketing team interpreted the North Carolina regulation to mean that the

applicable U. S. grade should appear on the container or be marked "unclassified," "not graded," or "grade not determined" but that no recommendation was explicitly made with respect to whether any other grade such as State grade might also appear on the containers.

It would have to be concluded that with both the Federal and State grade upon the container the quality problem would be eliminated. We can certainly appreciate your desire to maintain Washington State apple grades particularly when they are well established.

Thank you for your comments.

Sincerely,

CLAYTON YEUTTER

Clayton Yeutter
Assistant Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF LEW STERLING

(Filed 5 February 1976)

LEW STERLING, being first duly sworn on oath, deposes and says:

1. He is and for 12 years has been field representative for the Washington Apple Advertising Commission and represents the interest of the Washington State Apple In-

dustry in the southeastern markets of the United States which include North Carolina markets and Georgia markets.

2. He personally knows and has personal knowledge of the business activities of the following:

A. Boyce Enloe, Hendersonville North Carolina

B. Perry Lowe, Jr., Moravian Falls, North Carolina

C. Everette Lutz, Lawndale, North Carolina

D. Charles Murray, Raleigh, North Carolina

E. Richard N. Barber, Waynesville, North Carolina

3. None of the individuals listed in paragraph 2 buys or receives apples shipped into North Carolina in closed containers.

4. The individuals listed in paragraph 2, with the exception of Charles Murray, are engaged in the growing, packing and shipping of North Carolina apples.

5. Those purchasing apples in closed containers routinely place emphasis on the state as well as federal grades.

6. In the markets which I cover outside of North Carolina, specifically Atlanta, Georgia, the price quotation sheets which are part of the marketing report compiled by the United States Department of Agriculture report in terms of U. S. grades or their equivalent. Also, these reports separately report prices for Washington apples.

7. The market report of the USDA Market News, is currently not published in North Carolina.

LEW STERLING

Lew Sterling

(Jurat omitted in printing)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

SUPPLEMENTAL AFFIDAVIT OF C. W. SCHULKE
CONTROVERTING AFFIDAVITS OF DEFENDANTS

(Filed 5 February 1976)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

C. W. SCHULKE, being first duly sworn on oath, deposes and says:

* * *

2. Affiant controverts the affidavits of Curtis F. Tarleton and Charles Elks, which are identical, in the following respects:

A. In response to Statement 5, affiant states no confusion is involved in showing the Washington State grade in addition to the U. S. grades on closed containers of Washington apples in North Carolina, since the Washington State grade equals or exceeds the U. S. grade in every respect and wholesale buyers of Washington apples are knowledgeable is this regard. Showing the Washington grade in addition to the U. S. grade simply gives such buyers additional information and advises them that the U. S. grade shown on the container not only meets U. S. standards, but in addition meets the higher Washington State standards.

B. In response to Statement 11, at the time the North Carolina statute was adopted the U. S. grades were not as

a whole superior to the Washington State grade, but said two grades differed in various respects, in some of which the Washington State grade had higher standards and in others of which the U. S. grade had higher standards.

C. In response to Statement 12, the Washington State grade was revised September 1, 1974 to equal or exceed the U. S. grade, that is, in no respect is the Washington State grade inferior to the U. S. grade and in a number of respects it is superior. After this was done, efforts were then made to secure the consent of the North Carolina Department of Agriculture to permit the showing of Washington State grades in addition to the U. S. grades, but this permission was denied.

D. In response to Statement 13, it is true that the Washington State grades may be revised by the Director of Agriculture of the Washington State Department of Agriculture following hearing thereon. Similarly, no legislative action is required to revise the U. S. grades and such U. S. grades are subject to revision following hearing before the U. S. Department of Agriculture. Since 1962, Washington State apple standards have been revised only twice and in both cases to upgrade the standards. In the same period, U. S. standards have been revised three times.

E. In response to Statement 15, affiant has been informed that the North Carolina Department of Agriculture told Colonial Stores it could not advertise Washington State apples under the Washington State grade and prohibited that store from so advertising. If this is the policy of the North Carolina Department of Agriculture, presumably there are other instances of such prohibition.

F. In response to Statement 16, affiant states that the great majority of all shipping containers shipped from the State of Washington are preprinted with the grade and

Statement 16 of said affidavits is incorrect. See also comment on Statement 23.

G. In response to Statement 17, affiant points out that affidavits have been submitted by the Washington State Apple Commission showing that some Washington shippers have refused to ship to North Carolina and some North Carolina buyers have refused to purchase Washington apples because of the burden of obliteration and re-marking with the U. S. grade. Once this obliteration and re-marking has been accomplished, and except for the expense and mutilated appearance and inconvenience in connection therewith, there would then be no reason not to ship Washington apples to North Carolina or for North Carolina buyers not to purchase these apples. The problem arises because of the burden, expense and inconvenience attendant to having them "marked in accordance with the law", to use the language set forth in Statement 17.

H. In response to Statement 18, affiant states that both before and after the enactment of the North Carolina statute, Washington apples have been and now are subject to a mandatory inspection system to insure that the apples meet the grade shown on the shipping container, whether a U. S. grade is shown or the Washington State grade is shown, and therefore Washington apples not meeting the grade standards shown on the shipping container are not shipped to North Carolina or anywhere else. The Washington State mandatory inspection requirement is jointly administered by the Washington State Department of Agriculture and U. S. Department of Agriculture.

I. In response to Statement 19, affiant states there is nothing in the North Carolina statute which has any bearing on the quality of the apples shipped into North Carolina. The statute simply requires that closed shipping containers bear a U. S. grade or are marked "unclassified", "not

graded" or "grade not determined". Thus, apples can be shipped with no grade at all or with the lowest of U. S. grades. If there has been improvement of quality, it can only be because of buyer preference and not because of the North Carolina statute. The U. S. grade, if shown pursuant to the provisions of the North Carolina statute, permits apples of various standards of quality to be shipped in accordance with the various grade specifications, which consist of the following grades:

1. Extra Fancy
2. Fancy
3. U. S. No. 1
4. U. S. No. 1 Early
5. U. S. No. 1 Hail
6. U. S. Utility
7. Combination Extra Fancy and Fancy
8. Combination Fancy and U. S. No. 1
9. Combination U. S. No. 1 and U. S. Utility

If, as permitted by the North Carolina statute, apples are shipped into the state marked "unclassified", "not graded" or "grade not determined", there are no grade standards of quality whatsoever.

J. In response to Statement 20, affiant states that this statement only indicates the importance to North Carolina buyers of Washington apples that the Washington grade be shown and that its showing, in addition to the U. S. grade, should not be prohibited, since it serves a valuable function and better informs the North Carolina buyer.

K. In response to Statement 21, affiant points out that this statement is no justification to discriminate against Washington State apples.

L. In response to Statement 22, affiant states that Washington State ships no apples to the fresh market in

open containers, but all such apples are shipped in closed containers. In shipping in interstate commerce, particularly great distances such as between the State of Washington and the State of North Carolina, apples of high quality such as Washington State apples must be shipped in closed containers to protect them during shipment.

M. In response to Statement 23, affiant states, based on personal checking with container manufacturers, that prior to the enactment of the North Carolina statute approximately 95% to 98% of Washington State apple shipping containers were preprinted with the applicable grade. Because of the burden of the North Carolina statute, a minority but still a significant number of Washington State shippers are being forced to forego the economy of preprinting the grade and are being subjected to the cumbersome, slow, expensive method of hand stamping the grade because it is not known when the shipping container is packed with apples where those apples will be shipped and rather than obliterate the preprinted grade and re-mark a U. S. grade, some shippers are leaving the grade blank in the first instance. Preprinting the grade serves a valuable function in warehousing, because in recent years the Washington State apple industry as a whole has gone to printing the grade in highly legible large size print to enable easy reading of the grade, even when stored in cold storages and stacked in pallets up to 15 or 18 feet off the ground. Hand stamping, on the contrary, is not nearly as legible and is difficult to apply except in relatively small size print and is expensive.

N. In response to Statement 24, affiant states that the count is always hand stamped because until the time of packing a particular shipping container, the size of apples and therefore the number of apples is not known. However, the great majority of the cartons are preprinted with variety and grade, although, as indicated in answer to Statement 16, because of the burden of the North Carolina statute,

increasing numbers of shippers of Washington State apples are having to forego the economy and convenience of preprinting the grade because of the North Carolina requirement that a preprinted Washington State grade must be obliterated and the carton re-marked with the applicable U. S. grade.

O. In response to Statement 25, affiant agrees that a certain amount of apples from Washington State are bagged in plastic bags within the closed shipping container. However, this action is directed only to the marking on the closed shipping container and no objection is made to any North Carolina requirements as to marking the plastic bags which may be within the shipping container.

3. Affiant further controverts the affidavit of Lynwood Davenport, as follows:

A. In answer to Statements 1, 2, 3 and 4, affiant states that the Study Team had no authority to adopt any regulations with respect to marking closed shipping containers of apples, but simply reported the results of its study. Reference is made to letter dated May 16, 1973 from Clayton Yeutter, Assistant Secretary of the United States Department of Agriculture, a copy of which is attached to supplemental affidavit of Joseph T. Brownlow dated January 30, 1976, in which letter the Assistant Secretary states that the U. S. Department of Agriculture does not propose to take any action which would lead to the elimination of state grades for apples in those states where its industry believes them to be of value and concluded that he could appreciate the desire to maintain the Washington State apple grades, particularly when they are well established. The Assistant Secretary further stated that the Study Team interpreted the North Carolina regulation as meaning that the applicable U. S. grade should appear, but made no recommendation that the state grade not also appear on the containers. Assistant Secretary Yeutter concluded that with both the State and Federal grade appearing on the container, the quality problem would be eliminated. Consequently, affiant submits that the findings of the Study Team are of little significance in this action.

B. In answer to Statements 5, 6, and 7, affiant points out that these are simply speculative comments by Mr. Davenport and no action on the part of the United States Department of Agriculture has either been taken or indicated. On the contrary, the letter of Assistant Secretary Yeutter would indicate that the integrity of state grades will be preserved in those states desiring them and that there is no reason why they should not be shown in addition to the U. S. grade in those states where the showing of the U. S. grade is required.

C. W. SCHULKE

C. W. Schulke

(Jurat omitted in printing)

The Memorandum Opinion is printed in the Jurisdictional Statement at Page A-1.

(Please note: In the opinion as printed in the Jurisdictional Statement, the word "not" on page A-9, line 26, should be deleted.)

The Judgment is printed in the Jurisdictional Statement at Page B-1.

Supreme Court, U. S.
FILED
AUG 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-63

JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina, who are sued in their official capacity only

Appellants,

v.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, a Washington State Agency

Appellee.

APPELLEE'S MOTION TO AFFIRM OR DISMISS PURSUANT TO RULE 16

SLADE GORTON,
Attorney General
EDWARD B. MACKIE,
Deputy Attorney General
ROBERT C. HOWISON, JR.,
Special Assistant Attorney General
JAMES ARNEIL,
Special Assistant Attorney General

Temple of Justice
Olympia, Washington 98504
(206) 753-6207

STATE PRINTING PLANT OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-63

JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina, who are sued in their official capacity only

Appellants,

v.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, a Washington State Agency,

Appellee.

APPELLEE'S MOTION TO AFFIRM OR DISMISS PURSUANT TO RULE 16

SLADE GORTON,
Attorney General
EDWARD B. MACKIE,
Deputy Attorney General
ROBERT C. HOWISON, JR.,
Special Assistant Attorney General
JAMES ARNEIL,
Special Assistant Attorney General

Temple of Justice
Olympia, Washington 98504
(206) 753-6207

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-63

JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina, who are sued in their official capacity only

Appellants,

v.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, a Washington State Agency

Appellee.

APPELLEE'S MOTION TO AFFIRM OR DISMISS PURSUANT TO RULE 16

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States the Washington State Apple Advertising Commission, a Washington state agency, appellee, files this Motion to Affirm or Dismiss the appeal in this action.

OPINION BELOW

The opinion of the three-judge District Court appears in 408 F. Supp. 857 (E.D.N.C. 1976) and

is included in Appendix A of the jurisdictional statement filed by James E. Holshouser, *et al.*

APPELLEE'S POSITION

The appellee, Washington State Apple Advertising Commission, a Washington state agency, respectfully submits that the questions presented by the appellants' jurisdictional statement do not constitute substantial federal questions which warrant consideration by this Court.

STATEMENT OF THE CASE

The North Carolina General Statute § 106-189.1 prohibits the displaying of any grade other than the applicable U.S. grade on closed containers of apples sold, offered for sale, or shipped into North Carolina. North Carolina has not statutory requirement for the labeling or grading of apples in open containers, which is the manner in which most apples grown in North Carolina are sold in that state. The State of Washington is a major producer of apples in the United States and accounts for 50% of the interstate shipment of apples. The Washington apples are graded in accordance with Washington state apple grades, which equal or exceed in every particular the comparable grading requirement for U.S. grades. The Washington grades have been used for 60 years and are well accepted in the apple trade. Approximately $2,000,000 worth of Washington apples annually are shipped directly

into the State of North Carolina, with an additional 30-40% indirectly shipped into the state. The Apple Commission expends in excess of $25,000 on the advertising of Washington apples and brands within the State of North Carolina. The Washington grades appear on the closed containers which are shipped to wholesalers and are thus available to wholesalers and retailers to identify the products. Most retail purchases are made in quantities of less than a box, and thus the grade marking on the containers is not normally directly available to the consumer. While 13 states have state apple grades, only Washington and six other states use state grades for apples shipped into North Carolina, and only Washington extensively uses its state grades.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

The appellants' jurisdictional statement sets forth five questions that they allege to constitute substantial federal questions. (pp. 3-6) We will respond to those questions separately and as to all of those questions we assert that none of them present principles of federal law which warrant consideration by this court.

A. The appellants have contended that the appellee lacks standing to maintain this suit.

The Commission has been created by Washington state law as a state agency (chapter 15.24 Re-

vised Code of Washington) and is directed by the legislature to conduct comprehensive and extensive research, advertising and educational campaigns for the marketing of Washington apples. Washington statute RCW 15.24.070(8) expressly authorizes the appellee Commission to institute suits. The question of standing was explicitly considered by the three-judge court, which concluded that the Commission had standing, and we submit that this question was correctly resolved by the trial court and does not present a federal question of sufficient magnitude to warrant consideration by this court.

B. The appellants allege a lack of the jurisdictional $10,000 amount under 28 USC § 131.

The trial court specifically considered that contention and rejected it. The trial court observed that over $2,000,000 of Washington apples are shipped directly into North Carolina with an additional 30-40% being indirectly shipped. (F.F. # 4) Further, in excess of $25,000 was spent on advertising of Washington apples in the State of North Carolina for the 1974 crop (F.F. # 5). The trial court also found that the North Carolina statute places additional economic burdens on the processing of Washington apples. (F.F. # 10) Again, we respectfully submit that the question was correctly resolved by the trial court and does not raise a federal question warranting consideration by this court.

C. The appellants claim that invalidation of the statute as it applies to Washington state grade apples has impaired the state's ability to protect its citizens in the purchase of apples.

The record in this proceeding clearly establishes that the Washington state apples are graded at standards which meet or exceed comparable U.S. grades. Further, the decree entered in this matter does not enjoin the enforcement of the North Carolina statute as to apples from states which may have grading standards inferior to those of the U.S. grades. It only enjoins its enforcement as to Washington apples in closed containers. As indicated in the statement of the case, the grade markings on the boxes are for the purpose of identification to wholesalers and retailers. The overwhelming majority of apples sold in such containers are sold to the public in quantities of less than a box, and therefore are placed in containers; i.e., bags, etc., which do not display the box marking of the Washington grade markings. Hence, the consumer is not confused by the presence of the Washington grade, and the record indicates that the retailers and wholesalers desire the information regarding the Washington grades, and that the absence of that information would interject confusion rather than eliminate the same. We submit that the limited nature of the judgment entered in this matter does not present a substantial federal question warranting consideration by the court.

D. **The appellants allege that the District Court decision has ignored the United States Department of Agriculture's recommendation for uniformity in grading nomenclature.**

The appellants make reference to a report prepared for the Department of Agriculture in August of 1972, which has not been implemented by the adoption of any regulations by the United States Department of Agriculture. Further, the record in this proceeding makes clear, by a letter from the Assistant Secretary of the United States Department of Agriculture, that the United States Department of Agriculture does not propose to take any action which would lead to the elimination of state grades for apples in those states where its industry believes them to be of value, and further indicated that he could appreciate the desire to maintain the Washington state apple grades since they are well-established. The Assistant Secretary further indicated that by displaying both the state and federal grades on the container the quality problem of those states where the grades were inferior to the U.S. would be eliminated. Thus, there is no conflict between the United States agricultural statutes or regulations and the use of Washington grades on Washington apples. Clearly, a report issued in 1972 with no affirmative action to implement the same coupled with the fact that Congress has not acted to preempt state grading clearly indicates that the

appellants' contention does not give rise to any substantial federal question warranting review by this Court.

E. **The appellants have alleged that the District Court order has disrupted their efforts to maintain reasonable control over the branding of apples shipped into or sold within the State of North Carolina in closed containers.**

In response, the District Court did not invalidate the statute in its entirety but rather invalidated the statute insofar as it could apply to prohibit the display of Washington state grades which the record has established are equal to or exceed in all respects the U.S. grades referred to in the statute. Hence, any other state distributing apples in the State of North Carolina will be required to show that their grades are equal to or exceed the requirements of U.S. grades and the judgment in this action does not open the way for all marketing states to ship apples into North Carolina using misleading, deceptive or inferior state grades.

CONCLUSION

For the reasons stated above, the appellee submits that no substantial federal questions warranting review by this Court are presented and, therefore, we request that the Court affirm the decision of the three-judge court.

DATED this 13th day of August, 1976.

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I hereby certify that on this 13th day of August, 1976, three copies of the Appellee's Motion to Affirm or Dismiss pursuant to Rule 16 were mailed, postage paid, to Rufus L. Edmisten, Attorney General of the State of North Carolina, N.C. Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602 and to John R. Jordan, Jr., P.O. Box 709, Raleigh, North Carolina 27602, counsel for appellants. I further certify that all parties required to be served have been served.

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FILED
NOV 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-63

JAMES E. HOLSHOUSER, GOVERNOR
OF THE STATE OF NORTH CAROLINA,
ET AL.
Appellants

vs.

THE WASHINGTON STATE APPLE
ADVERTISING COMMISSION,
A WASHINGTON STATE AGENCY

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

NO. 76-63

JAMES HOLSHOUSER, GOVERNOR
OF THE STATE OF NORTH CAROLINA, ET AL.

Appellants

vs.

THE WASHINGTON STATE APPLE
ADVERTISING COMMISSION,
A WASHINGTON STATE AGENCY

Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the three-judge District Court appears in 408 F.Supp. 857 (E.D.N.C. 1976) and is printed in the Jurisdictional Statement as Appendix A. The opinion of the single-judge District Court denying the motion to dismiss is printed in the Single Appendix at page 51.*

* All citations to the Jurisdictional Statement are denoted "(Jur. St. . . .)."

* All citations to the Single Appendix are denoted "(A. . . .)."

JURISDICTION

The appeal herein is from a final judgment made and entered in the United States District Court for the Eastern District of North Carolina. The judgment enjoins the enforcement of a state statute. The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. §1253.

The final judgment was entered April 22, 1976. Notice of Appeal was filed on May 20, 1976, in the United States District Court for the Eastern District of North Carolina. The Jurisdictional Statement was filed on July 16, 1976, and the question of jurisdiction was postponed on October 4, 1976. ____ U.S. ____, 45 U.S.L.W. 3220 (October 5, 1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause, U. S. Constitution, Art. I, §8, cl. 3, provides: "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. 28 U.S.C. §1331(a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

3. The General Statutes of North Carolina §106-189.1, as amended by Chapter 506 of the Session Laws of 1973, provide:

(a) All apples, sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle no grade other than the applicable U. S. grade or standard or the marking "unclassified", "not graded" or "grade not determined."

(b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than Fifty Dollars ($50.00). Each day on which the apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

QUESTIONS PRESENTED

1. Did the court below err in refusing to dismiss the action because the Washington State Apple Advertising Commission lacked standing to bring the action?

2. Did the court below err in refusing to dismiss the action because the jurisdictional amount requirement of 28 U.S.C. §1331 was not met?

3. Did the court below err in declaring N. C. Gen. Stat. §106-189.1 unconstitutional as imposing an impermissible burden on interstate commerce and in enjoining the enforcement of the statute insofar as it precluded the display of the Washington State grade on closed containers of apples shipped into the State of North Carolina?

STATEMENT OF THE CASE

North Carolina Gen. Stat. §106-189.1 was duly enacted into law by the General Assembly of North Carolina as a part of the North Carolina Marketing and Branding Farm Products Law. It requires that "no grade other than the applicable U. S. grade" be shown on closed containers of apples sold, offered for sale, or shipped into North Carolina. There is no prohibition against labeling the containers or otherwise advertising thereon that the apples are "Washington State Apples" or those of any other state.

The Washington State Apple Advertising Commission filed suit requesting a declaratory judgment that the statute was unconstitutional and requesting that enforcement of the statute be permanently enjoined.

The District Court overruled appellants' motion to dismiss on the ground that the jurisdictional amount requirement of 28 U.S.C. §1331 was not met and that the Washington State Apple Advertising Commission lacked standing to challenge the statute. After a hearing on the merits, the District Court held that the statute contravened the Commerce Clause of the United States Constitution, and it enjoined enforcement of the statute insofar as it precluded the display of the Washington State grade on closed containers of apples shipped into North Carolina. (Jur. St. B-1).

SUMMARY OF ARGUMENT

North Carolina contends that the Washington State Apple Advertising Commission ("Commission") lacks standing to maintain this action, and that its pleadings establish to a legal certainty that the jurisdictional amount requirement of 28 U.S.C. §1331(a) is not satisfied. The Commission is not a membership organization here asserting the rights of its members. Nor does it have such a "personal stake" in the outcome of the action as to entitle it to rightfully claim standing to maintain the action in its own behalf. Its allegations of injury relate to shippers and growers of Washington State apples, all non-parties to this action. They are under no disability to assert their own interests, and their absence as parties to the action is evidence that the issues are of less importance than the Commission contends and that the Commission is asking this Court to make an unnecessary constitutional determination.

In numerous decisions, this Court has recognized that the states have a special interest in regulating the inspection,

branding and marketing of food products within their borders. *E.g., Pacific States Box & Basket Co. vs. White,* 296 U.S. 176 (1935); *Sligh v. Kirkwood,* 237 U.S. 52 (1915).

North Carolina has legislated in an even-handed manner in requiring that all apples, wherever grown, if sold, offered for sale or shipped into the State, show only the applicable U. S. grade. Enactment of the statute has had several positive effects on the marketing of apples within the State:

> (a.) It has eliminated the sale within the State of apples branded with state grades which utilize the same indicative terms (Extra Francy, Fancy, etc.) as the U. S. grades, but are of inferior quality than apples of the comparable U. S. grade. (A. 76-77)
>
> (b.) It has precluded the possibility that North Carolina would become yet another state utilizing its own separate grading standards for apples.
>
> (c.) It has imposed upon North Carolina growers who pack and ship apples for sale within the State, the requirement that they meet U. S. grading standards, thus imposing standards where there were none previously.
>
> (d.) It has resulted in apples of better quality being shipped into the State for sale there. (A. 77)
>
> (e.) It has been hailed in the report of a team study done for the U. S. Department of Agriculture as a step forward toward introducing a measure of uniformity into the nomenclature of apple grading standards. (A. 88-89)

The statute is consistent with proposals by the U. S. Department of Agriculture to establish a uniform grade

nomenclature for U. S. grades of fresh fruit, vegetables, nuts and other products. (A. 90-94). The many variations in grade names and standards can only result in confusion, even among experienced dealers. The challenged statute imposes one, uniform grading standard for apples sold or shipped into North Carolina in closed containers.

North Carolina contends that enactment of the statute was a valid exercise of the police power, and that the statute does not impose an unconstitutional burden upon interstate commerce.

ARGUMENT

I. *THE COURT BELOW ERRED IN REFUSING TO DISMISS THE ACTION BECAUSE THE WASHINGTON STATE APPLE ADVERTISING COMMISSION LACKED STANDING TO BRING THE ACTION.*

A. THE COMMISSION CANNOT BRING THE ACTION ON BEHALF OF ITS OWN INTERESTS.

The threshold question is whether the Washington State Apple Advertising Commission ("Commission") has standing to invoke the power of the federal judiciary. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Two distinct questions are presented:

> "[F]irst, whether the plaintiff-appellees allege 'injury in fact,' that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy

> subject to a federal court's Art. III jurisdiction, and, second, whether, as a prudential matter, the plaintiff-appellees are proper proponents of the particular legal rights on which they base their suit." *Singleton v. Wulff*, ____ U.S. ____, 96 S.Ct. 2868, 2873 (1976).

The first of these questions requires an inquiry as to whether the Commission has alleged that it has suffered "injury in fact" occasioned by operation of the challenged statute. The Commission's pleadings do not allege injury or loss to the Commission itself, but rather to individuals not a party to this action, *e.g.*, growers and shippers of Washington State apples. The function of the Commission is to promote and expand the market for Washington apples. (A. 28). Nowhere in the pleadings does the Commission claim that it grows or ships apples, or that the challenged statute affects its activities. The pleadings reveal a total absence of allegations that the Commission has a sufficiently concrete interest in the outcome of the suit to satisfy the "case or controversy" requirement and permit the federal courts to exercise jurisdiction over the matter. "The Art. III question is one of power within our constitutional system, as courts may decide only actual cases and controversies between the parties who stand before the court." *Id.*, at ____, 96 S.Ct. at 2878. The interest being asserted by the Commission, and to which it claims injury, is the interest of Washington State apple growers and shippers to utilize, without restriction, Washington State apple grades on closed containers of apples. The Amended Complaint alleges only that growers and shippers have incurred additional expense in complying with the challenged statute. North Carolina contends that allegations of injury to Washington shippers and growers are insufficient to establish a case or controversy in the context of this suit, for no Washington State shippers and growers are parties to the action.

This Court has, in recent decisions, expanded the types of "personal stakes" which are capable of conferring stand-

ing on a potential plaintiff. *E.g., Data Processing Service vs. Camp,* 397 U.S. 150 (1970). However, as this Court said in *Sierra Club vs. Morton,* 405 U.S. 727, 738 (1972):

> "[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."

In referring to the above holding, this Court, in *Linda R. S. vs. Richard D.,* 410 U.S. 614, 617 (1973) said:

> "Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." (footnotes omitted)

Upon application of this test to the allegations contained in the Amended Complaint, it is apparent that the Commission has failed to allege a sufficient nexus between any injury which it can claim and the statute which it attacks to justify judicial intervention. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury as the result of [a statute's] enforcement." *Massachusetts vs. Mellon,* 262 U.S. 447, 488 (1923) (emphasis added). In the matter before this Court, the Commission has failed to show that it will suffer any injury whatsoever because of the challenged statute and has failed to establish its standing to sue in its own behalf.

B. THE COMMISSION CANNOT BRING THE ACTION AS A REPRESENTATIVE OF WASHINGTON STATE APPLE GROWERS AND SHIPPERS.

The second inquiry referred to in *Singleton v. Wulff,* is a matter of "judicial self-governance"[1] and is reached only if a "case or controversy" is found to exist between the parties. North Carolina contends that even if the Court finds that the Article III requirement is met, it should refuse to entertain this action and adhere to the Court's general rule that "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson,* 346 U.S. 249, 255 (1953).

It should be noted at the outset that the Commission is not a voluntary membership organization, but rather is an agency of the State of Washington. (A. 28) It is financed by assessments levied on all Washington State apple growers according to gross billing weight of apples grown and packed within the State. (A. 28-29) Individual growers cannot participate or refuse to participate according to their own opinions and desires. They are required by law to finance the activities of the Commission, but they do not enjoy membership status in the Commission for no such status exists.

Associations have, on rare occasions, been allowed to assert the rights of their members.[2] In a recent case,[3] this Court said:

> "The possibility of such representational standing, however, does not eliminate or attenuate the constitutional

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[1] *Warth v. Seldin,* 422 U.S. 490, 509 (1975).

[2] *E.g., NAACP v. Alabama,* 357 U.S. 449 (1958).

[3] *Warth v. Seldin,* 422 U.S. 490, 511 (1975).

> requirement of a case or controversy. (Citation omitted.) The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."

Since the Commission is not a membership organization, there are no members for it to represent. Even in those cases where this Court has allowed an organization to represent its members, it has done so only where federal statute acknowledged such organization as the representative of its members,[4] or the organization was acting to protect its members' associational ties.[5]

The Commission has no members whose rights it can assert by representation.[6] It is not an organization engaged in advocacy of a cause so as to require the interposition of

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[4] *National Motor Freight Traffic Association, Inc. v. U. S.*, 372 U. S. 246 (1963) was a per curiam decision in which this Court held that motor carrier associations had standing to challenge an Interstate Commerce Commission order approving a tariff published by a freight forwarder. The Court noted that the motor carrier associations were "authorized under 49 U.S.C. § 5b, and perform significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission." *Id.*, at 247.

[5] In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court held that an order that the Association produce records including the names and addresses of all its members and agents denied due process and entailed the likelihood of a substantial restraint upon the members' exercise of their rights to freedom of association.

[6] In the opinion denying North Carolina's motion to dismiss, the District Court repeatedly referred to the Commission as the "Association" and treated it as though it were a membership organization. (A. 51)

the Commission between the apple growers and others hostile to their activities in order to protect the rights of the growers. Those individuals for whom the Commission purports to speak are under no disability nor disadvantage to come forward and assert their claims personally, if they so desire. The absence of such involvement by those purportedly aggrieved is some evidence that the controversy which the Commission claims exists is of a lesser magnitude in the minds of those actually affected than the Commission will admit. Their absence suggests that this Court is being asked to make an unnecessary constitutional determination.

The Commission cannot establish its standing by virtue of its particular interest in promoting and advertising Washington State apples. *Simon v. Eastern Kentucky Welfare Rights Organization*, ____ U.S. ____, 96 S.Ct. 1917 (1976), decided last term, is a case in point. That case involved an action brought by low-income individuals, and organizations claiming to represent such individuals, to challenge the validity of Revenue Ruling 69-545 on the basis that it "encouraged" hospitals to deny services to indigents. In discussing the standing issue, this Court said:

> "We note at the outset that the five respondent organizations, which describe themselves as dedicated to promoting access of the poor to health services, could not establish their standing simply on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. (Citations omitted.) Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail." ____ U.S. at ____, 96 S.Ct. at 1925.

Likewise, the Commission here claims standing on the basis of its special interest in the promotion of Washington State apples. The Commission has no greater interest in the out-

come of the controversy than did the organizations in *Simon*. The Commission's claim to standing is weaker than that of the organizations in *Simon* for there "[t]he plaintiff organizations described themselves as an unincorporated association and several non-profit corporations each of which included low-income persons among its members . . ." ____ U.S. at ____, 96 S.Ct. at 1921 (footnotes omitted). The Commission, on the other hand, being a non-membership organization, cannot claim to be composed of members whose claims it is asserting by representation. The individual shippers and growers of Washington State apples are the only ones who can properly assert those claims.

In summary, the Commission's pleadings show clearly that it is attempting to assert the rights of third parties on the basis of its claim to having a special interest in the Washington State apple industry. Decisions of this Court establish that such a special interest is simply not a sufficient basis upon which to claim standing.

II. *THE COURT BELOW ERRED IN REFUSING TO DISMISS THE ACTION BECAUSE THE JURISDICTIONAL AMOUNT REQUIREMENT OF 28 U.S.C. §1331 WAS NOT MET.*

The party invoking the federal court's jurisdiction has the duty of affirmatively alleging jurisdiction; and if his allegations are challenged, he has the burden of establishing jurisdiction.[7] If it appears that the court lacks jurisdiction of the subject matter, the court should dismiss the action.[8]

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[7] *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936).

[8] The test for jurisdictional amount was established by this Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-9 (1938): "The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. * * * But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."

In order to sustain its claim under 28 U.S.C. §1331, the Commission must show that its right to be free of the regulation imposed by N. C. Gen. Stat. §106-189.1 is worth more than $10,000.00.[9] The Commission has not addressed this question, but has relied upon a broadside allegation that the amount in controversy exceeds $10,000.00. (A. 27). The Commission does allege that it spent in excess of $25,000.00 for advertising and promotion in North Carolina for the 1974 crop year (A. 30), an allegation that does not purport to speak to the jurisdictional amount requirement. There is no allegation that the sums expended for promotion and advertising will be affected in any manner by the outcome of this action. In paragraph 14 of the Amended Complaint (A. 32), the Commission alleges "injury, damage and loss . . . [to] the Washington State apple industry and its individual growers, as represented by plaintiff" in an amount greater than $10,000.00. This is the Commission's only attempt to meet the jurisdictional amount requirement, and its deficiency is apparent. Since the Commission has made no showing in its pleadings or affidavits that *it* has, or will in the future, suffer any monetary injury as a result of the

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[9] In *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936), this Court said: "The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed."

operation of the challenged statute, it has failed to establish facts essential to support its jurisdictional claim.

It appears from the pleadings that the Commission is relying upon the aggregated claims of the various growers and shippers in the State of Washington in order to satisfy the jurisdictional amount requirement. North Carolina contends that the Commission cannot under any circumstances aggregate the claims of *non-parties* in order to satisfy the jurisdictional amount requirement. Additionally, North Carolina contends that even were shippers and growers parties to the action, they could not properly aggregate their claims to satisfy the jurisdictional amount requirement.[10]

III. *THE COURT BELOW ERRED IN DECLARING THAT N. C. GEN. STAT. §106-189.1 IMPOSED AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.*

A. IT IS PARTICULARLY APPROPRIATE FOR THE STATE TO REGULATE FOODSTUFFS MARKETED WITHIN THE STATE.

The power to regulate interstate commerce is expressly given to the federal Congress in the Commerce Clause. But in the absence of congressional legislation, "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."[11]

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[10] See *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which was an action based upon diversity of citizenship. The same jurisdictional amount requirement is imposed, however, under 28 U.S.C. § 1331(a).

[11] *Southern Pacific Co. vs. State of Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945).

In the absence of federal action, the control of the inspection, branding and packing of farm products for market has historically been a matter of local concern, and branding and packaging legislation designed to promote the public health and welfare has almost uniformly been upheld as a constitutional exercise of the police power.[12]

When the health, safety, and welfare of local residents are being protected through a reasonable exercise of a state's "police power", there is a strong presumption that the challenged statute is constitutional. Thus, despite the fact that interstate commerce was affected or burdened to some extent, this Court has upheld state regulations pertaining to food where the chief purpose or effect was to protect local purchasers of food from fraud or deception, *Plumley v. Massachusetts*, 155 U.S. 461 (1894), or from misbranding, *Corn Products Refining Co. v. Eddy*, 249 U.S. 427 (1919), of from unwholesome, impure, or injurious food, *Price v. Illinois*, 238 U.S. 446 (1915).

The case of *Pacific States Box & Basket Co. vs. White*, 296 U.S. 176 (1935) is analogous to the case here under consideration. There an Oregon administrative official's order prescribing standard containers for raspberries and strawberries was upheld. This Court found that the order was an appropriate exercise of the police power of the state, since fixing both the form and dimensions of berry containers might be an important factor in preserving the condition of the berries and would eliminate the confusion to purchasers resulting from a multitude of shapes and sizes of packages. Likewise, North Carolina has sought to reduce the

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[12] *E.g., Sligh v. Kirkwood*, 237 U.S. 52 (1915) (Upheld Florida statute making it a criminal offense to ship immature citrus fruit in interstate commerce.); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935) (Upheld order setting size standards for containers.)

confusion resulting from multiple grade labeling by requiring that only the U. S. grade be shown on closed apple containers.

State regulations pertaining to food have been deemed by this Court as dealing with matters especially appropriate for state regulation. Thus, holding that the commerce clause was not violated by a Massachusetts statute prohibiting the sale of oleomargarine manufactured in imitation of butter, in *Plumley v. Massachusetts, supra,* this Court noted that the states had the power to exclude from their markets any compound manufactured in another state which had been artificially colored or adulterated so as to cause it to look like a different food, thereby defrauding the public; that legislation protecting the public from such fraud in connection with the sale of food could be most advantageously exercised by the states themselves; and that statutes could thus provide such protection without infringing upon the authority of the federal government. It should be noted that *Plumley* upheld the total exclusion of yellow colored oleomargarine from sale in Massachusetts. In comparison, the North Carolina statute under challenge imposes only a uniform grading requirement and does not attempt to exclude the product from sale within the State.

This Court has made no distinction between state regulations aimed at eliminating impure or unsafe foodstuffs and those aimed at eliminating confusion and deception in the marketing of foodstuffs. The case of *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963) is instructive. That case involved an action by Florida avocado growers to enjoin enforcement of a California statute which gauged the maturity of avocados by oil content and prohibited the transportation and sale in California of avocados which contained less than 8% oil by weight. The case presented the question of whether the California statute unconstitutionally excluded Florida avocados certified to be mature under federal regulations but which failed to meet

the California maturity test. The Court noted that the maturity of avocados shipped into California for sale to the public is a matter which is within the regulatory power of the State.

> "[T]he maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence. Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." 373 U.S. at 144.

Likewise, North Carolina's regulation of the branding of apples sold within its boundaries is properly within the State's scope of supervision. Although not strictly a health measure, the statute is akin to state regulations protecting the health and welfare of the State's citizens. The Court said in *Florida Lime and Avocado*:

> "While it is conceded that the California statute is not a health measure, neither logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers. (Footnotes omitted). Nothing appearing in the record before us affords any ground for departure in this case from our consistent refusal to draw such a distinction." 373 U.S. at 146.

The North Carolina statute regulates a matter of peculiarly local concern and cannot be distinguished from other statutes enacted to protect the health and welfare of the citizenry of the State.

B. THE TEST TO BE APPLIED IN DETERMINING THE CONSTITUTIONALITY OF THE STATUTE.

This Court's statement of the test to be applied in determining the validity of a state statute under attack as

violative of the Commerce Clause is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

This is a continuation of the Court's approach in the earlier interstate carrier cases.[13] In those cases, the Court adopted a test which required that the burden imposed on interstate commerce be balanced against the local benefit in order to determine the ultimate question of constitutionality. In *Bibb* and *Southern Pacific* the state statutes were struck down because they imposed requirements that were impossible for the interstate carriers to meet, since various states were imposing incompatible requirements upon them. The national interest in uniformity was the controlling factor in the Court's decisions. North Carolina contends that the national interest in uniformity will be promoted by upholding the challenged statute. The statute encourages the use of one, uniform grading standard in the marketing of apples.

The *Pike* case involved an action by a grower of high quality cantaloupes against an official charged with enforcing an Arizona statute prohibiting the grower from transporting uncrated cantaloupes from its Arizona ranch to a nearby California city for packing and processing. Arizona wanted the cantaloupes packed in Arizona and shipped in containers identifying them as Arizona-grown, thereby enhancing the state's reputation through the reflected good will of the

[13] *E.g., Bibb v. Navajo Fright Lines, Inc.*, 359 U.S. 520 (1950); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

grower's superior produce. Although the Court stated that it recognized the legitimate interest of the State in attempting to maximize the financial return to an industry within the State, it characterized the state's interest in having the company's cantaloupes identified as Arizona-grown as "tenuous."[14] Most importantly, the Court did not consider the statute to be one enacted pursuant to the police power to protect consumers from contaminated, misbranded, or unfit goods. "Its [the statute's] purpose and design are simply to protect and enhance the reputation of growers within the State."[15]

North Carolina contends that the Commission's interest in having the Washington State grade shown on cartons shipped into North Carolina is likewise "tenuous". It cannot reasonably be based upon the right to advertise the product, because the challenged statute does not interfere with the use of printed advertising on the carton. A shipper is free to place "Washington State Apples", or like material, on the shipping carton without restriction.

Although *Pike* involved a food item, it was not a case involving the health, safety and welfare of the citizens of Arizona.[16] The Court, finding only a minimal state interest and a considerable burden on the grower, struck down the statute.

[14] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

[15] *Id.*, at 143.

[16] The Court noted that: "We are not, then dealing here 'with state legislation in the field of safety where the propriety of local regulation has long been recognized,' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State." *Id.*

North Carolina contends that the statute here involved does directly affect the quality of apples which are made available for sale to the citizens of the State, and that there is, therefore, a strong presumption that it is constitutional.

C. THE CHALLENGED STATUTE DOES NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

Less than one percent of the annual Washington State apple crop is shipped into North Carolina. (A. 76) Defendants contend that the burden of complying with its branding laws is *de minimus* and does not rise to the level of constitutional significance. The statute in no way reduces the effectiveness of any means of interstate transportation, as did the statutes involved in the interstate carrier cases. The statute does not inhibit uniformity in the grading of apples shipped in interstate commerce. Indeed, the statute promotes uniformity, a goal which even now is being pursued by the U. S. Department of Agriculture. (A. 90-94)

N. C. Gen. Stat. 106-189.1 is part of Article 17 of the General Statutes, which article is entitled "Marketing and Branding Farm Products". (A. 74) The purpose of the Article is set forth in N. C. Gen. Stat. 106-185 as follows:

> "The purpose of this Article is to give authority to investigate marketing conditions and to establish and maintain standard grades and packages . . . for farm and horticultural crops and animal products."

A large number of states ship apples in interstate commerce and, of those states, a considerable number have their own state grading standards. (A. 75) Among the states having grading standards, there is no uniformity in grading standards but they use the same indicative terms (*E.g.*, Extra Fancy, Fancy, etc.). (A. 75) Washington State is one of

many states which ships apples into North Carolina and the fact that Washington has upgraded its standards is of little constitutional significance. The Washington standards can be changed without legislative action and could be lowered in the future. (A. 76) The Judgment entered by the District Court would prevent enforcement of the statute even if the Washington State grades were openly manipulated from year to year in response to changing market conditions.

The District Court found as a fact that "the existence of multiple, inconsistent state grades pose[s] a danger of confusion in the apple marketing industry." (Jur. St. A-5, F of F. 11). North Carolina has legislated in an even-handed manner in regulating the branding of apples offered for sale within the State in closed containers. All states, including North Carolina, must meet the same uniform requirements. The District Court gave scant attention to the positive aspects of the legislation. The statute imposed upon North Carolina shippers the requirement that U.S. grades be utilized, thus imposing standards where before there had been none. Enactment of the statute meant that North Carolina would not be added to the list of states using their own separate grading standards. After the statute was enacted, the quality of apples shipped into North Carolina improved. (A. 77) The statute gave local growers an incentive to up-grade the quality of fruit they shipped, because they had to meet U. S. standards if they wished to utilize the grades recognized in the industry as reserved only for apples of highest quality (Extra Fancy, Fancy, etc.).

Apparently, the District Court was concerned about the fact that the statute allows the shipment of apples "with no grade at all." (Jur. St. at A-9). This is not an unreasonable provision in the statute, although at first blush it may appear so. The uses of apples are many; the prettiest and tastiest apples of the year's crop are no doubt sold for consumption as fresh fruit. It would be reasonable to expect

that the fruit of lesser quality would be utilized to produce the dried apples, the apple sauce, the apple juice, the apple vinegar, the canned apples, the frozen apples, and other apple products that are produced in this country. The better apples will be inspected, packaged and shipped for sale in the fresh fruit market, and only the apples of lesser quality will be shipped ungraded. The shipper can ship his apples of lesser quality in ungraded lots, but he knows that the price he can expect to receive will be commensurate with the lower quality the buyer will expect to receive.

Additionally, the District Court was concerned that the statute applied only to apples in closed containers. (Jur. St. at A-9). When a buyer purchases apples in a closed container, he must of necessity rely on the grade markings on the carton. The buyer who purchases from open containers, however, is not so confined in determining the quality of the fruit. He can utilize all of his senses to determine if the fruit is of the quality he desires. North Carolina contends that the disparate treatment afforded sales in open containers is based upon rational differences in the ability of the buyer to inspect the fruit he is purchasing. Extension of the statute to open containers would also, as a practical matter, make the statute impractical and unenforceable. If applied to open containers, the statute would require inspection and grading at every little roadside stand where apples are sold to passers-by during the growing season. Obviously, the North Carolina General Assembly did not perceive such an extension of the statute to be needed or workable.

The need for the introduction of uniformity into the area of grades for apples and other fruits and produce is readily apparent. One recommendation of the United States Department of Agriculture team study conducted in 1972 was that state grades be eliminated to "lessen confusion in trading". (A. 88) The study noted that, at that time, 13

states had their own apple grades and standards, but that only Washington was using its grades extensively. It noted that variations in certain requirements lead to confusion in trading, and it said *"Elimination of State grades and adoption of U. S. grades would lessen confusion at the wholesale and retail levels."* (emphasis added.) (A. 82) This is not a study done by some state agency to support protective legislation; it is a study done nationally by a group of impartial experts. It is the State of Washington which is out of step with the rest of the nation in this particular area, not the contrary, as the Commission would have this Court believe. The move toward uniformity in grading standards is a necessity when viewed in the larger context. The United States Department of Agriculture has proposed establishing a uniform grading nomenclature for U. S. grades for fresh fruits, vegetables, nuts and other special products. (A. 90-94) In its proposal the Department notes that "there are 152 grade standards covering 82 fresh fruits and vegetables" that that there are "at least four different terms to describe the top grade" for those 82 fresh fruits, vegetables, nuts and other special products. After adding to this multitude of U. S. grades the various and sundry state grading variations, it is readily apparent that the opportunity for confusion, even among wholesalers and traders, is great. It is a legitimate exercise of the State's police power to attempt to reduce the opportunities for confusion by the even-handed regulation of grading standards.

C. CONCLUSION TO COMMERCE CLAUSE PORTION OF ARGUMENT.

This Court has afforded the states wide latitude in regulating the labeling and marketing of food items sold within their boundaries, food being a matter of primary importance to the local citizenry. The statute here in question imposes a minor burden, at most, on Washington growers. It is nondiscriminatory in nature and is based on a rational

and reasonable desire to standardize grading labels, reduce confusion, and prevent deception. The statute does not impose an unconstitutional burden on interstate commerce and should, therefore, be upheld as a valid exercise of the police power of the State of North Carolina.

CONCLUSION

The decision of the District Court should be reversed and this action should be remanded with instructions to dismiss the complaint.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE UNITED STATES

No. 76-63

JAMES HOLSHOUSER, GOVERNOR OF THE STATE OF NORTH CAROLINA, ET AL.

Appellants,

vs.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, A WASHINGTON STATE AGENCY

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF APPELLEE

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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 76-63

JAMES HOLSHOUSER, GOVERNOR
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Appellants,

VS.

THE WASHINGTON STATE APPLE ADVERTISING
COMMISSION, A WASHINGTON STATE AGENCY

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF APPELLEE

JURISDICTION

The appeal herein is from a final judgment made and entered in the United States District Court for the Eastern District of North Carolina. The judgment enjoins the enforcement of part of a state statute. The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. § 1253.

The final judgment was entered April 22, 1976. Notice of Appeal was filed on May 20, 1976, in the United States District Court for the Eastern District

of North Carolina. The Jurisdictional Statement was filed on July 16, 1976, and the question of jurisdiction was postponed on October 4, 1976. ..... U.S. ....., 45 U.S.L.W. 3220 (October 5, 1976).

QUESTIONS PRESENTED

The appeal from the decision of the three-Judge federal district court in North Carolina, opinion and judgment reported in 408 F. Supp. 857 (E.D.N.C. 1976) and printed in the jurisdictional statement as Appendix A, presents three questions:

(1) Did the Washington State Apple Advertising Commission have standing to institute this action?

(2) Was the jurisdictional amount requirement of 28 USC § 1331 met?

(3) Did the court below correctly declare that North Carolina General Statute § 106-189.1 was unconstitutional and correctly enjoin the enforcement of that statute insofar as it precluded the display of the Washington State grades on closed containers of apples shipped into the State of North Carolina?

APPELLEE'S MOTION TO AFFIRM OR DISMISS PURSUANT TO RULE 16

The appellee Washington State Apple Advertising Commission has previously filed a motion requesting that this Court either affirm or dismiss pursuant to Rule 16. That request was based upon the proposition that the questions presented by the appellants' jurisdictional statement do not constitute

substantial federal questions which warrant consideration by this Court. The Court by order dated October 4, 1976, has ruled that:

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."

STATEMENT OF THE CASE

Washington State is the nation's leading producer of apples, producing approximately 30% of the apples grown in the United States. Nearly 50% of all the apples shipped in closed containers to fresh markets in interstate commerce are apples grown in the State of Washington (A. 16). The State of Washington has recognized the need to protect the reputation of its apples by requiring that all apples shipped out of the State of Washington must meet stringent mandatory inspection requirements. This mandatory inspection at the point of origin is unique in the apple industry. (A. 19) During the sixty years that Washington apple grades have been in existence, they have gained a substantial trade acceptance in the fresh fruit wholesaling business. (A. 18) It is common for apple dealers outside the State of Washington to indicate a preference of Washington State apple grades over U.S. grades because of the consistency of the application of the Washington State grades with their emphasis upon color and mandatory prior inspection. (A. 19) The mandatory inspection requirement by the State of Washington costs the apple growers in Washington

State approximately $1,000,000 annually for inspecting approximately 40,000,000 bushel-boxes of apples.

The Washington State legislature created the appellee, Washington State Apple Advertising Commission, as a state agency. The commission is charged with the responsibility of promoting the welfare of the state and stabilizing and protecting the apple industry of the state as well as expanding and protecting the state apple market in the public interest. It further has responsibility to enhance the reputation of Washington apples in domestic and foreign markets. (A. 49-50; Revised Code of Washington 15.24.900; A. 48; Revised Code of Washington 15.24.160) The members of the commission are nominated by apple growers and dealers in the State of Washington and are elected by them within electorial districts by secret ballot. (A. 41, 43) To finance the operations of the commission, an assessment is imposed upon the apple growers which in 1974 totalled $1,737,990. The assessments can be increased only upon being approved by one-half of the apple growers in an election. (A. 46; Revised Code of Washington 15.24.090)

The North Carolina Board of Agriculture adopted an administrative regulation, No. 324.5(6), which read in part:

> "Apple containers must show the applicable U.S. grades * * * State grades shall not be shown. * * * "

This regulation presented a substantial problem for

the marketing of Washington State apples and, therefore, the Washington Apple Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the showing of state grades. An administrative hearing was held before the board in North Carolina on March 19, 1973. (A. 104) Shortly following that administrative hearing, North Carolina General Statute § 106-189.1 was introduced and passed by the North Carolina General Assembly:

> "(a) All apples, sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle no grade other than the applicable U.S. grade or standard or the marking 'unclassified', 'not graded' or 'grade not determined.'
> " * * * "

This statute, which is the subject of this litigation, does not require that apples grown in or shipped into the state of North Carolina be graded. The statute requires that apples in closed containers which do bear a grade must bear the U.S. grade, and no other grade is permitted. In 1974 after the Washington State Director of Agriculture had amended the Washington State apple grades so that they were equivalent or superior to comparable U.S. grades, the Washington Apple Commission requested permission, to ship apples in closed containers showing both the Washington grade and the U.S. grade, from the North Carolina Commissioner of Agriculture. The North Carolina commissioner candidly responded

that before such permission could be granted, it would be necessary to have the law which was passed in the 1973 North Carolina legislature amended to permit this, and "I naturally want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed * * *" (A. 19-21)

The concern of the Washington Apple Commission and the growers, packers and dealers which it represents with respect to the North Carolina law is reflected in affidavits on behalf of firms which account for in excess of 30% of the entire annual crop of Washington State apples which are shipped fresh in closed containers.[1] The practice of the apple industry in the State of Washington is to order shipping containers of one bushel capacity for packed apples in advance of the harvesting season. These containers are pre-printed with the appropriate variety and grades and are subsequently filled with apples of the appropriate grade. (A-17, 63) A substantial portion of the Washington apples are held in cold storage and by February 1 of each year approximately two-thirds of all the apples on hand to be sold on the fresh markets in the United States are apples grown in the State of Washington. (A. 98-99) The shipping containers each containing one bushel of apples are then shipped to all parts of the United States. In the

[1]C. W. Schulke (A. 62-66) and the following affidavits, which are not printed in the appendix, filed on January 29, 1976; Herbert L. Frank (1/20/76); Dick Shumway (1/22/76); Richard Larsen (1/23/76); Frank Coleman (1/20/76); Clayton Udell (1/20/76); Robert Scea (1/23/76); Bill Hartmann (1/24/76).

1974 crop year, Washington growers shipped approximately 339,000 boxes of apples worth in excess of $2,000,000 directly into the State of North Carolina. (A. 17) Other Washington apples were trans-shipped into North Carolina from distribution centers in surrounding states. These trans-shipments represent approximately an additional 140,000 boxes being shipping into North Carolina in the 1974 crop year. (A. 17) The requirement of the removal of Washington grades, which have been extensively used for over 60 years, from shipping containers going into the State of North Carolina has had the following impact upon the distribution of Washington apples:

(1) There has been a cancellation of orders for apples by customers within North Carolina and in adjoining states faced with the problem of remarking for reshipment to North Carolina; (A. 64)

(2) Washington processors of apples have been required to either obliterate the Washington State grades on the pre-printed containers at a cost of between 5¢ to 15¢ per box for apples destined for North Carolina (this reflects an annual cost of $23,950 to $71,850) or to discontinue the use of pre-printed boxes showing Washington grades, which creates problems in other markets; (A. 17, 63)

(3) There has been a reluctance by some Washington growers and packers to accept orders from North Carolina because of problems in complying with the North Carolina statute. (A. 63-64)

The Washington State Apple Commission in 1974 expended in excess of $25,000 for advertising and promoting Washington apples within the State of North Carolina. (A. 17) The shipping containers which have the Washington State grades upon them are seldom sold to retail customers in such containers. (A. 18) The boxes are delivered to retail establishments where most of the sales thereof are from open bins or in plastic bags. Wholesalers and brokers who are doing business in North Carolina and South Carolina have indicated that, on the basis of years of experience, they rely upon Washington State grades and desire to have that information when buying and selling apples. (A. 67, 71)[2] Further, they have not been confused by the existence of the Washington grade on containers which they have received in the past. (A. 68, 72)[3]

The Washington State Apple Advertising Commission, having been unsuccessful in its attempts administratively to solve the problems presented by the North Carolina statute, commenced this action to fulfill its responsibilities under Washington state law to promote domestic markets for Washington apples. The costs of the suit are borne by the Washington apple producers and growers who are assessed by the commission to carry out its responsibilities and the action was brought to protect their interests.

[2]Additional affidavits not included in the appendix: Gillis Coleman (1/19/76) filed 1/29/76; Arlis Vernon (1/23/76) filed 1/26/76; John C. Taylor (1/23/76) filed 1/26/76; Joe McGee (1/22/76) filed 1/26/76; Avery Womble (1/22/76) filed 1/26/76.

[3]Ibid.

The three-judge federal court enjoined the State of North Carolina from applying as to Washington State apples that portion of the statute § 106-189.1 which prohibited the display of state grades. The court did not invalidate the statutory requirement that the U.S. grades must be displayed.

SUMMARY OF ARGUMENT

Washington State apple grades have been in existence for 60 years. The State of Washington requires that all apples shipped outside the state must meet stringent grading requirements and be so labeled. This program is designed to insure the quality of Washington apples and to secure and enhance their reputation throughout the world since the apple industry is a major industry within the State of Washington. The Washington State apple grades are the equivalent or superior in every respect to the comparable U.S. grades.

The North Carolina statute which prohibits the display of state grades has had a severe impact upon the interstate commerce of Washington apples. The efficient processing of Washington apples involves the use of preprinted containers which indicate the respective state grades. This grade label identifies the product for wholesalers and dealers throughout the world and further facilitates the effective handling of apples in cold storage warehouses. The North Carolina statute requires the discontinuation of such preprinted containers or, alternatively, the obliteration of such state grades upon any apple containers

being shipped either directly or indirectly into the State of North Carolina. We respectfully concur with the conclusion of the three-judge United States federal district court that such a prohibition violates the Commerce Clause of the United States Constitution.

We believe the same result is also supported by two alternative grounds which the district court did not have to reach in rendering its judgment. First, the North Carolina statute constitutes an unconstitutional restriction on the 1st Amendment right of free speech since the labeling of state grades conveys accurate, factual information which may be considered in the nature of commercial speech. The second ground is the unreasonable classification by the State of North Carolina in (i) singling out only apples of the various fresh fruit for distribution in the state, and (ii) not applying the statute to any apples in open containers, which encompasses the vast majority of the apples produced within the State of North Carolina.

The appellee Washington State Apple Advertising Commission has standing to institute this action both on behalf of itself and its members, the Washington State apple producers who elect the membership of the commission and pay for its costs by assessments. Further, the commission has under state law the authority to sue and to enhance the domestic market for Washington apples. The economic impact of the North Carolina statute is substantially in

excess of the $10,000 jurisdictional amount, 28 USC § 1331, both upon the commission and the Washington apple producers. We respectfully submit that the federal district court had jurisdiction to entertain the action, properly decided the same, and should be affirmed by this Court.

ARGUMENT

A. Interstate Commerce — Article I, § 8, Clause 3, United States Constitution.

(1) *Introduction.*

This Court on numerous occasions has considered the scope of the Commerce Clause in reference to state power for the regulation of commerce. In *Welton v. Missouri*, 92 U.S. 275 (1876), this Court stated that commerce comprehends any intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale and exchange of commodities between citizens of different states. It is clear that the transportation and subsequent sale of Washington apples shipped from the State of Washington and distributed within the State of North Carolina comes within the ambit of the Commerce Clause. The purpose of the Commerce Clause of the United States Constitution is to create an area of free trade among the several states. Thus, the Commerce Clause is a limitation upon the power of states even without Congressional action. (See, *The Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Although the appellants' brief makes reference to a report by a study team of the

United States Department of Agriculture in 1972 and a proposal by the Department for uniform grading nomenclature (App. Br. 22-23), there has not been any federal legislative or administrative action creating a federal preemption of the subject matter of this litigation.

Although the federal government has the authority to regulate the branding of perishable fruits and produce sold in interstate commerce, it has not chosen to preempt this field. While there are references in the record and in the briefs to United States grades for apples, there is no federal requirement that apples be graded in accordance with those standards. The United States grades for apples are a label which if used then must meet the qualifications of the grade. There is no requirement of preinspection nor a compulsion to utilize U.S. grades for apples shipped in interstate commerce. The United States Department of Agriculture regulation concerning the inspection, certification and standards of fresh fruits and vegetables, which includes apples, published in 32 Fed. Register 15066, effective December 1, 1976, § 61.13 states:

> Inspection and certification service for quality and/or condition shall be based upon the appropriate standards promulgated by the U.S. Department of Agriculture, *applicable standards prescribed by the laws of the states where the particular product was produced*, specifications of any governmental agency, written buyer and seller contract specifications, or written specification by an applicant which is provided by the

> administrator: Provided, that if such product is regulated pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601 et seq.), or *comparable laws of any state*, such inspection and certification shall be on the basis of the standards, if any, prescribed in, or pursuant to, the marketing order and/or agreement effective thereunder. (Emphasis supplied)

We would emphasize that the desirability or undesirability of requiring a single uniform U.S. grade for apples throughout the United States is not an issue in this proceeding. The issue is whether the State of North Carolina, which does not require the grading of apples either grown or shipped into the State of North Carolina, can prohibit the State of Washington from displaying its grades, which are equal or superior to U.S. grades in all respects.

(2) *Balancing test.*

When the exercise of a state's police power interferes with interstate commerce, the question becomes whether the burden is unreasonable. While there is no absolute formula to determine reasonableness, this court in *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945), established the balance-of-interest test—that is, for a state regulation to be constitutional, its benefits must outweigh the burden on interstate commerce. In balancing the interests, the court is always concerned with the fundamental objective and actual purpose of the state law, and not merely the declared purpose.

Whenever it appears that the true purpose or

objective of the state regulation is to discriminate against the products of another state, or create an economic barrier to the free-flow of commerce, the regulation will be invalidated. "One state in its dealings with another may not place itself in a position of economic isolation." *Dean Milk Company v. City of Madison*, 340 U.S. 349 (1951). The *Dean Milk* case stands for the proposition that the declared purpose for the state's regulation of interstate commerce cannot be for some fanciful reason, but must be based upon a legitimate exercise of a police power designed to promote the public welfare.

More recently, this Court again considered the balancing of local interests protected by statutes and the burden that those statutes impose upon interstate commerce in *Great Atlantic & Pacific Tea Co. v. Cottrell, supra.* While invalidating the Mississippi statute requiring reciprocity in order to permit the importation of milk from another state, this Court relied upon *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In the *Pike* case, an Arizona statute required that cantaloupes grown in Arizona be packed in closed, standard containers approved by the supervisor. The supervisor, by order, prohibited the plaintiff, who was engaged in an extensive cantaloupe farming operation in Arizona, from shipping its cantaloupes in open containers to a plant which it owned and operated in California. This Court, in finding that the Arizona official acted in violation of the Commerce Clause, stated:

> Although the criteria for determining the validity of state statutes offsetting interstate commerce has been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits (citations omitted). If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally, the Court has candidly undertaken a balancing approach in resolving these issues (citations omitted), but more frequently, it has spoken in terms of "direct" and "indirect" effects and burdens (citations omitted). *Id.* at 142. [The above quote, with the exception of the last sentence, was quoted in *Great Atlantic & Pacific Tea Co., supra*, at 371, 372.]

The State of North Carolina has adopted a branding law which applies not only to apples produced in the State of North Carolina but to all apples shipped into the State of North Carolina. Therefore, the North Carolina legislature has attempted to affect apples grown, packed and shipped outside of the jurisdiction of North Carolina by prohibiting the showing of state apple grades. The State of North Carolina, by a not so subtle subterfuge, is attempting to (1) force a uniform federal grade on all apple marketing states and (2) insulate its apple industry

from competition from Washington State. That the true purpose of this legislation is mere trade protection for the North Carolina apple industry, and not consumer protection, is apparent from the exchange of correspondence between the Washington Apple Commission and North Carolina Agriculture Commissioner Graham. Mr. Brownlow respectfully asked that Washington State apples be exempted from the onerous requirements of G. S. § 106-189.1 since the Washington grades are equal or superior to United States grades. (A. 19) Commissioner Graham frankly responded, in effect, that he could not, or would not, authorize such an exemption without checking first with the North Carolina apple growers since *they were responsible* for the legislation:

> I naturally want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed and I have asked the Secretary of the Apple Growers Association to bring this matter to the attention of their Board at its next meeting. (A. 21)

(3) *North Carolina's local interest.*

In utilizing the balancing burdens test, consideration must be given to whether the North Carolina statute regulates even-handedly to effectuate a legitimate local public interest. Reference must first be made to what the North Carolina statute does and does not affect:

(i) The statute does not preclude the use of state grades or grades other than U.S. on apples which are sold in open containers. It is noteworthy

that the overwhelming volume of North Carolina grown apples are sold in open containers.

(ii) The statute does not require that apples be graded to meet any specific qualifications, even when sold in closed containers.

(iii) The statute precludes the showing of a state grade even if the United States grade is also indicated.

The State of North Carolina is ostensibly using the aegis and refuge of consumer protection in attempting to find sufficient "public welfare" to justify the existence of this statute, although the statute is silent as to its intended purpose. Moreover, the facts clearly show that the pre-printed Washington State grades on apple shipping containers are not displayed to North Carolina retail consumers. The statute makes no mention of prohibiting the showing of a state grade in a retail store or in any form of advertisement. In any event, since the Washington State grades are equal or superior to the equivalent United States grades in every respect, there simply cannot be any confusion created by a dual showing of the grades. Furthermore, the record establishes that apple wholesalers and dealers in North Carolina prefer and are not confused by the Washington grades.[4] If a buyer acquiring apples under the Washington State grade labored under the illusion that he was acquiring the equivalent United States grade, he

[4]See, A. 67, 68, 71, 72, and affidavits cited in fn. 2. Furthermore, the affidavit of Lew Sterling (A. 109) indicates that none of the appellants' affiants (A. 102-103) buy or receive apples shipped into North Carolina in closed containers.

would always get an apple of equal quality, or, in many cases, an apple of superior quality. The purchasers of Washington apples in shipping containers are wholesalers and distributors, who are knowledgeable in the field and are better informed as to quality of the apples by the display of the Washington State grade in addition to the United States grade.

The appellants' brief does not cite any facts which would support the conclusion that the placing of the Washington State grade upon apple containers produces a confusion by local purchasers. The only material relevant to that contention is a reference to the United States Department of Agriculture Study Team Report in 1972 (App. Br. 23). With reference to that report, it should be noted that the Assistant Secretary of the United States Department of Agriculture stated:

> "It would have to be concluded that with both the federal and state grade upon the container the quality problem would be eliminated. We certainly appreciate your desire to maintain Washington state apple grades particularly when they are well-established." (A. 109)

Further, the facts establish that the individuals who are engaged in the wholesaling and retailing of apples in North Carolina are not confused by the presence of the Washington State grades. (See, A. 66-72; Affs. cited in footnote 2.) This response is important because these are the individuals in the industry who would be affected by the existence or nonexistence of state grades on the containers. The

retail consumer, as previously noted, purchases apples either from a bulk display in a retail establishment or in plastic bags. In neither situation does the existence of the Washington State grade on the shipping container come to their attention. Thus, in no way can it confuse such retail customers.

We contend, therefore, that the local interest which the statute seeks to protect is the economic interest of local apple growers and producers to be free from out-of-state competition. This exercise of police power has often been found in violation of the Commerce Clause; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Polar Ice Cream & Creamery Co. v. Andrews* 375 U.S. 361 (1964); *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511 (1935); *H. P. Hood & Sons, Inc. v. DuMond* 366 U.S. 525 (1949).

North Carolina is saying that Washington growers must be graded according to lower standards and may not display the evidence of Washington's standards. In other words, what the State of North Carolina has, in fact, done with respect to Washington, is to exclude Washington apples which are shipped under higher standards than federal standards, and thus forced the State of Washington to market its apples under a lower standard. This is intuitively unfair; no state should have the right to compel a sister state to follow a less restrictive, and hence, less beneficial to the consumer, standard of grading. As stated in *Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963), it is a permissible objective of a

state to promote the marketability, by way of higher standards, of a product of the state to the benefit of the whole industry. This is what the State of Washington has done, and the State of North Carolina has no justifiable basis on which to force the State of Washington to use the lower standards of United States grades when shipping into the State of North Carolina. The Washington apple industry is proud of its product, and wants it graded under stricter standards than competing state industries. It has every right to do this.

(4) *Burdens on interstate commerce.*

The three-judge court has properly found that as a direct result of the enactment of the North Carolina General Statute, § 106-189.1, there has been the following impact upon apple growers in the State of Washington:

> "(a) Washington state grades have been manually obliterated from closed shipping boxes to be shipped to North Carolina at a cost of 5 to 15 cents per box;
> "(b) Preprinting of shipping boxes with state grades has been abandoned and the applicable United States grade stamped manually or mechanically on boxes;
> "(c) Accounts in North Carolina have been cancelled, and the sales to the state curtailed. (Some individuals have abandoned marketing in the state entirely.)
> "These results of legislation constitute a burden on interstate commerce." (Jurisdictional Statement A-4)

These impacts upon the interstate commerce

Washington apples extend well beyond the boundaries of the State of North Carolina. As previously indicated, approximately 30% of the Washington apples which are shipped to North Carolina are originally shipped to some other destinations and trans-shipped to North Carolina. This means that if the Washington grades are included on the container, which is permissible in the other 49 states, someone must assume the responsibility of obliterating those grades when the apples are trans-shipped to North Carolina. This has resulted in refusal of some apple handlers to accept that responsibility. Further, the obliteration gives the apple containers a mutilated appearance which is not desirable by wholesalers and shippers. If an apple producing state such as North Carolina can impose this type of restriction, its duplication by a relatively small number of other states could effectively remove the ability to market Washington grades which have been in existence for some 60 years and are established standards well-accepted in the apple industry.

North Carolina growers, in the past, have called for "uniformity" of grades and have attempted to justify their statute on that basis. Two pertinent examples of an unconstitutional state attempt to regulate interstate commerce, under the guise of "uniformity", are *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In the *Bibb* case, the court held that a state statute requiring a particular and pe-

culiar type of mud guard on tractor-trailers, to the exclusion of other model mud guards that were permissible for use in 45 states of the union, constituted an unconstitutional burden on interstate commerce despite the fact that it was nondiscriminatory. The court's reasoning: It would be extremely burdensome and virtually impossible to require interstate motor carriers to stop at the border of each state to change mud guards. Extending this reasoning to the instant case, it would be said that to require the obliteration of Washington State grades, which are acceptable not only in 49 other states, but throughout the world, on apples offered for sale or simply shipped into the State of North Carolina for resale outside the state is analogous to a requirement to change mud guards on trucks at state borders. North Carolina is the only place in the world where it is illegal to show the Washington State grade. Of more significance, in order to satisfy the peculiar requirements of the North Carolina marketing statute, the Washington State apple industry has been forced to alter its whole marketing and inspection program at great inconvenience, confusion and expense. Any claimed benefit to North Carolina consumers simply does not outweigh the predominant federal interest of keeping a free-flow of interstate commerce.

In the *Baldwin* case, *supra*, the court found unconstitutional a New York statute that provided that milk sold in the New York area had to be purchased on terms that would be lawful if the transaction occurred within the State of New York. The court found that New York simply could not legislate in an area outside its jurisdiction in an effort to force other states to conform to New York's economic and public welfare standards. Thus, the *Baldwin* case appears to be unusually germane to the case at bar.

There are three lower federal court decisions also in point with regard to the question of branding and labeling of produce sold in interstate commerce. *Tupman Thurlow Co. v. Moss*, 252 F. Supp. 641 (M.D. Tenn. 1965); *Armour & Co. v. Nebraska*, 270 F. Supp. 941 (D.C. Neb. 1967); *International Packers Limited v. Hughes*, 271 F. Supp. 430 (S.D. Iowa 1967). These cases all support the contention that the North Carolina statute in question is unconstitutional. Each case involves a statute requiring shippers of imported meat to show through conspicuous labeling that it was meat raised outside of the United States. The three-judge courts in each case noted that the meat produced in foreign countries is by law not permitted entry into the United States *except under federal inspection* and found that there was no legitimate interest in the legislation and that it was merely an attempt to insulate the domestic industry from outside competition.

In *International Packers*, the three-judge court held that the act was discriminatory because the enforcement of the provisions would essentially eliminate the sale of imported meats into Iowa because retailers, fearing an adverse reaction from the con-

suming public, simply would refuse to sell foreign meat so long as they were required to label it as such. In pertinent part, the court said:

> Defendants attempt to support the labeling legislation on the ground that it protects Iowa consumers from deception. Defendants premise their contention upon the assumption that consumers purchasing meat in Iowa believe that they are buying domestic meat. Defendants thus reason that failure to inform consumers as to when they are purchasing imported meats results in deception. Even if plaintiff's basic premise is accepted, there has been no showing that such deception, if any, results in injury or harm to the consuming public. It has not been established that the imported meat is inferior in quality to domestic meat. Even if it were inferior, the labeling statute is designed to inform the public only as to the origin of meat products containing imported meat—not as to the quality of that product. The statute primarily discriminates in favor of domestic meat and against meat imported from foreign countries. This court can find no legitimate state interest justifying the burden imposed upon interstate commerce by the Iowa Meat Labeling Act. The Iowa Act violates the Commerce Clause of the Constitution of the United States and is therefore void and unenforceable. *Id.* at 443.

Likewise, it is obvious that there has been no showing on the part of North Carolina of deception harmful to the public where Washington grades are involved because the Washington grades are equal or superior to equivalent United States grades in every respect. The North Carolina purchaser buying under Washington grades would always get an apple of equal or

superior quality to the same apple purchased under equivalent United States grades.

The true intent of the North Carolina statute can best be determined by considering all the facts and circumstances, and in particular, that the North Carolina apple industry is in *direct competition* with the Washington State apple industry. Where there is direct competition between state industries the courts have been suspect of the stated purposes for justifying any discriminatory regulation concerning labeling. *Florida Avocado Growers v. Paul, supra.*

(5) *Commerce Clause conclusion.*

The appellee respectfully submits that North Carolina General Statute § 106-189.1 insofar as it precludes the showing of state grades on closed apple containers creates an unconstitutional burden upon Commerce, and the minimal to nonexistent local interests of the State of North Carolina cannot justify the imposition of that restriction. The Washington State Apple Adverising Commission therefore respectfully submits that the three-judge court correctly determined that the North Carolina statute violated the Commerce Clause and properly enjoined the enforcement of that provision precluding the showing of Washington State grades.

The appellee has contended that the North Carolina statute violates the Commerce Clause, the 1st Amendment and the Equal Protection and Due Process Clauses of the United States Constitution. In oral argument before the three-judge court, the appellee

pressed the first two of these claims. While the appellee concurs with the conclusion that the Commerce Clause is dispositive of the action, it will proceed to set forth arguments which support the alternative grounds for obtaining the same relief; that is, that the North Carolina statute violates the 1st Amendment to the United States Constitution and/or the Equal Protection and Due Process guarantees.

B. **First Amendment Protection of the Right of Free Speech as Incorporated into the Due Process Clause of the 14th Amendment.**

Washington State apple grades have been in existence approximately sixty years and have gained a substantial trade acceptance and meaning in the fresh fruit wholesaling business. United States grades have been in existence since the late 1930's. Since the Agricultural Adjustment Act, which establishes joint, federal and state inspections, allows for substantial regional control over inspection services, there is a question as to the uniformity of interpretation under United States grades. On the other hand, Washington State apple grades are given carefully controlled, uniform and consistent application within the State of Washington. Moreover, all apples shipped out of the State of Washington must meet stringent and mandatory inspection requirements. This mandatory inspection at the point of origin is unique throughout the apple industry. Therefore, commodity dealers know exactly what Washington State apple grades mean, due to their long history and rigid inspection

standards, and they use that grading system as a criterion for purchasing Washington apples.

It follows that Washington State growers have a right of free expression to show their grade on apple containers; that is, they have the right to show the Washington state grade in preference to showing the United States grade. Conversely, North Carolina buyers, and buyers shipping into North Carolina from secondary sources, have *a right to know* under what Washington grade the Washington apples are being shipped. Since Washington grades emphasize color, a highly influencing factor in consumer purchasing habits, North Carolina and other out-of-state buyers have a right to use the Washington State grading system which uniquely emphasizes color. The State of North Carolina cannot abrogate the grading laws of its sister states unless those grading laws infringe upon some police power reasonably designed to protect the citizens of North Carolina from a health hazard or deception in labeling.

The right to free speech is perhaps the most jealously protected right guaranteed under the Bill of Rights. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

> The freedom of speech and press embrace the right to distribute literature, and necessarily protects the right to receive literature which is distributed. It is said that liberty in circulating is as essential to the freedom as liberty of publishing, since publication without circulation would be of little value. * * * The free publication and dissemination of books and

> other forms of printed word are protected by the constitutional guarantee of freedom of speech and press, irrespective of whether the dissemination takes place under commercial auspices. 16 Am Jur 2d Constitutional Law §344, citing *Smith v. California*, 361 U.S. 147.

To validate a legislative infringement upon this right, the court must find that the police power protecting the interest of the citizens of the State must be of overwhelming inportance.

Here we are concerned with North Carolina requiring the expunging or obliteration of certain information. It stands to reason that the consumer or commercial buyer can only be hindered in making his intelligent informed choice as to what to purchase if he has less information from which to work. Therefore, the North Carolina statute not only infringes upon the right of free expression for the Washington apple growers and the Apple Commission, but also upon the *right to know* of the North Carolina consumer and commercial buyer, as that right is protected by the Privileges and immunities Clause of the First Amendment. Thus, rather than enhancing the public welfare of the State of North Carolina, this statute serves to detract from the public welfare.

The case of *Swift & Co. v. Wickham*, 230 F. Supp. 398 (SDNY 1964) is in point. Swift & Co. placed federally approved labels on its turkeys which indicated the weight of the turkey including the stuffing and innards in the package. The State of New York required that packaged turkeys display

the net turkey weight. The district court stated that it " * * * would not outlaw further statements concerning weight so long as these do not obscure or detract from the force of the federally approved label, and so long as they are not presented so as to imply federal approval." The district court opinion was affirmed by the second circuit in 364 F. 2d 241 (1966). The holding of this case clearly indicates a public policy in favor of greater information on labels of closed containers.

Finally, the free speech protections of the Constitution were recently applied with increased vigor to commercial advertising situations. In *Population Services International v. Wilson*, 398 F. Supp. 321 (SDNY 1975) the district court declared unconstitutional a statute prohibiting the dissemination of informational material relating to contraception. The court held that a state-attempted ban on all advertising and displaying of non-prescription contraceptives violated the First Amendment.

Likewise (under facts similar to the instant case), the district court in *Anderson Clayton & Co. v. Washington State Department of Agriculture*, 402 F. Supp. 1253 (W.D. Wash. 1975) held that the State of Washington's attempted ban of the use of the word "butter" in margarine advertisements was a violation of the plaintiff sellers' First Amendment right of free speech and press. Under the statute, sellers of margarine in the State of Washington had to "cut out" or "trim out" comparative references to

butter in their advertising. The court cited the following passage from *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) for authority that "commercial advertisements" have equal status with other forms of speech and press under the First Amendment.

> "The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.
>
> The court has stated that 'a state cannot foreclose the exercise of constitutional rights by mere labels.' *NAACP v. Button*, 371 U.S., at 429. Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id* at 1257.

The district court then proceeded to balance the free speech right against the state interest of preventing public confusion, etc.

> "We equate the Plaintiffs First Amendment immunities and privileges and the public's interest in public dissemination of true and honest advertising of factual information regarding food products evenly with that in the ultimate acquisition of prescription drugs, abortion, and contraceptives.
>
> In turn, the Defendants contend that the compelling state interest sought to be protected through the enforcement of RCW 15.40.030 is protection of the public from confusion, fraud and deception in the marketing of margarine.
>
> Assuming, *arguendo*, that Plaintiffs advertisements do carry confusing and deceptive comparative references to the dairy product butter and their margarine products, as the Defendants would have us believe, and the express purpose and force of RCW 15.40.030 is in the pursuit of a legitimate state interest of the state, nevertheless substantial state law restrictions upon the free exercise of per se or fundamental constitutional rights, such as First Amendment immunities and privileges, are unconstitutional unless the state can demonstrate that such laws are necessary to promote a compelling governmental interest. *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); and *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)." *Id.* at 1257

C. The Due Process and Equal Protection Clauses of the United States Constitution.

The Fourteenth Amendment, Equal Protection Clause, provides that "no state * * * shall deny any person within its jurisdiction equal protection of the laws." Thus, a state must provide that its application of a given law is nondiscriminatory within its own jurisdiction. The usual legislative method to minimize any inherent inequality or disparity of treatment by the application of a law is to provide for various classes of persons or property.

It is generally accepted that there are three criteria which must be established to support any statutory classification—(1) the classification must be rational; (2) the classification must bear a reasonable relationship to a proper legislative purpose; (3) all persons within a class must be treated equally. In recent years, this Court has employed an even stricter test of reasonableness where the classifica-

tion is based upon "suspect criteria." That test is that there must be a compelling state interest served by the classification. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Measured against these tests of reasonableness, the North Carolina statute in question fails. Gen. Stat. § 106-189.1 is violative of the Equal Protection Clause because: (1) apples are singled out for disparate treatment from all other farm products referred to in the General Marketing and Branding Law under N. C. Gen. Stat. § 106-189, and (2) apples in closed containers, N.C. Gen. Stat. § 106-189.1, are treated differently than apples in open containers, N. C. Gen. Stat. § 106-189.2.

Common sense or experience do not indicate why apples should be treated differently from peaches, grapefruit, pears or any other farm product. There is no apparent or stated reason why state grades are allowed to be shown on closed containers of other commodities, when they are not allowed to be shown on closed containers of apples. Nor, is there any apparent or obvious reason why apples in closed containers may not be marked with a state grade, while apples in open containers may be so marked. It is suggested that the real reason for treating apples in closed containers differently is because this is a thinly-veiled attempt to discourage the Washington State apple industry from competing with the North Carolina apple industry. Obviously, all Washington apples shipped into North Carolina must come in closed containers; this is not true of apples shipped into North Carolina from adjacent states, such as Virginia and West Virginia, which may come in open bushel baskets.

Even if the ostensive purpose of this statute is to protect North Carolina consumers from deception and fraud, there is no clear, cogent and convincing reason why marking apple containers with the Washington State grades amounts to deception when this grade is shown alongside the U.S. grade and the Washington grade is equal or superior to the U.S. grade in every respect.

The North Carolina General Statute § 106-189.1 fails to meet the criteria of reasonableness of classification and is thus violative of the Equal Protection and Due Process Clauses of the 14th Amendment to the United States Constitution.

D. **Standing of the Appellee Washington State Apple Advertising Commission.**

The appellee Washington State Apple Advertising Commission, as previously noted, was created by the state legislature to stabilize and protect the apple industry in the State of Washington and promote the welfare of the state. It is further directed to enhance the reputation of Washington apples in domestic and foreign markets. The commission members are nominated and elected by apple producers and dealers in the State of Washington. The commission is financed by assessments made upon producers which can only be increased following an election by the producers.

Washington State law, RCW 15.24.070(8) (A-45) specifically authorizes the commission to sue or be sued. The commission in order to carry out its responsibilities has instituted this action both on behalf of itself and its members, both of whom have been harmed by the North Carolina statute.

Federal Rule 17(a) describes a real party in interest as including "a party authorized by statute * * * (b). * * * The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized * * *" As previously noted, the Washington State Apple Advertising Commission has statutory authority to sue and thus comes within the provisions of Rule 17.

The appellee suffers substantial injury in its own right. A purpose of the Washington State Apple Advertising Commission is to promote the good will of the Washington apple industry. This is accomplished, in part, through promotional advertising of the Washington State grades. Since this action attacks the North Carolina regulatory scheme for interference with those efforts, the Commission has alleged a direct injury for which it is entitled to seek relief.

Even assuming, arguendo, that the Commission only asserts the right of apple growers or shippers, we contend that the rule against relying on the Constitutional rights of another is not part of the Constitutional requirement of standing, but a rule of self-restraint that the Court has developed for its

own governance, and thus is a mere rule of practice not to be applied where it might preclude one from asserting a grievance before the Court. *Barrows v. Jackson*, 346 U.S. 249 (1953). *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

The question of "standing" was extensively discussed by this Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972). The Sierra Club, a membership corporation alleging a special interest in conservation, challenged the proposed ski development in Mineral King, California. The Sierra Club did not make any allegation in its pleadings that its members would be affected (*Supra*, 731.) This Court observed:

> "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. [Citations omitted]" *Supra*, at 739.

While amicus participating in the *Sierra Club* appeal asserted that some individual members of the club would be affected by the project, this Court noted, *supra*, at 734, footnote 7:

> "Moreover, the Sierra Club in its reply brief specifically declines to rely upon its own individualized interest, as a basis for standing."

In short, in *Sierra Club*, this Court held that the Sierra Club simply failed in its pleadings to allege that its members were damaged by the possible development of the Mineral King skiing area. No such disability exists in the Apple Commission complaint. In the Plaintiff's amended complaint, it has stated:

"In addition, the Washington Apple Commission is charged, among other things, by statute with the stabilization and protection of the Washington State apple industry and the expansion and promotion of the market of Washington apples on behalf of individual Washington Apple Growers. * * *" [A-28, ¶4]

"* * * The Apple Commission is financed by assessments levied on all Washington State Apple Growers in the amount of 12 cents per each 100 pounds of gross billing weight on all apples grown and packed in the State of Washington." [A-28, 29 ¶5]

"Washington State Apple Growers, and Plaintiff, have suffered real, immediate, substantial and irreparable injury, damage and loss since the passage of the North Carolina statute as a result of the restraints and burdens on Interstate Commerce imposed as alleged herein. Said injury, damage and loss has amounted to more than $10,000.00, and the Washington State apple industry, and its individual growers, as represented by the Plaintiff, who will continue to sustain such irreparable injury, damage and loss, unless the Court grants relief prayed herein." [A-32, ¶14]

This Court recently in *Warth v. Seldin*, 422 U.S. 490 (1975) extensively discussed the standing of a number of parties. An observation which is particularly pertinent in the present litigation is the distinction that the court recognized between an association seeking injunctive or declaratory relief as contrasted with damages on behalf of the membership. In noting this distinction, this Court stated, *supra* at 515:

> * * * whether an association has standing

> to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. E.g., National Motor Freight Assn. 372 US 246, 9 L Ed 2d 709, 83 S Ct 688 (1963). See Data Processing Servi[illegible]. Camp, 397 US 150, 25 L Ed 2d 184, 90 S Ct 827 (1970). Cf. Fed Rule Civ Proc 23(b)(2).

The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. Home Builders alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such.

Finally, in *U.S. v. SCRAP*, 412 U.S. 669 (1973), this Court upheld the right of a number of environmental groups, to bring suit, including "Students Challenging Regulatory Agency Procedures (SCRAP)" even though the defendant challenged the standing of this group on the basis that the injury alleged was one which would be suffered by the public at large, and in any event the actual extent of injury to the Plaintiff's members was not significant. The Court found no merit to either objection. It said:

> Neither the fact that the appellees have claimed only harm to their use and enjoyment of the natural resources of the Washington area,

nor the fact that all of those whose resources suffered the same harm, deprives them of standing. Id at 686-687.

The Court continued

> To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody. We cannot accept that conclusion. *Id* at 688.

This Court most recently in *Singleton v. Wulff*, ... US ..... 49 L ed 2nd 826 (1976), discussed the concept of standing and stated:

> "Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. * * *" *Id* at 833

It is readily apparent from the facts in the current proceeding that the Washington producers and dealers do wish to challenge of the North Carolina statute as having an adverse impact on the operations of their industry, and the appellee has done so on its own and on their behalf.

> "* * * Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates

> of those rights are before them. * * *" *Id* at 833.

Again, there is no doubt that in the present proceedings there has been effective advocacy on behalf of the appellee and the Washington producers and dealers which it represents. This Court then observed:

> "* * * These two considerations underlie the Court's general rule: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S., at 255. See also *Flast v. Cohen*, 392 U.S., at 99 n. 20; *McGowan v. Maryland*, 366 U.S. 420, 429 (1961).
>
> Like any general rule, however, this one should not be applied where its underlying justifications are absent. * * *" *Id* at 833

We respectfully submit that the underlying justifications referred to by this Court in Singleton, *supra*, are clearly absent in the present proceedings. Thus, this Court should reject the challenge to the standing of the Apple Commission to bring this action in its own right and/or as a representative of the Washington apple producers and dealers.

(a) *Jurisdiction under 28 U.S.C. § 1331*

The matter of jurisdictional amount can be difficult to determine when the Plaintiff seeks to enforce some right instead of suing for monetary damages. In suits where injunctions, or declaratory judgments are requested, the amount of the object sought to be gained by the Plaintiff determines the amount. *Glenwood Light and Water vs. Mutual Light*, 239 U.S. 121 (1915). The jurisdictional

amount is approached from the Plaintiff's perspective.

In those cases where a private businessman sues to enjoin the enforcement of a State statute as being an unreasonable interference with his business, the rule has been that the jurisdictional amount is determined by what it cost the businessman in loss profits in *one year* to comply with the State regulation. In the *Kroger vs. Luts* case, 299 U.S. 300, 301 (1936), the rule was stated as follows:

> The amount in controversy where it does not appear that the Complainant is deprived of its license or is prevented by regulations from prosecuting his business, the question is not the value or net worth of the business, but the value of right to be free from regulation, and they may be measured by the loss, of any, that would follow enforcement of the rule prescribed.

In the case at bar, the facts establish that the direct costs of obliterating Washington State grades from apple containers is 5¢ to 15¢ per carton (A. 27), which represents a cost range of $23,950 to $71,850 annually to comply with the North Carolina statute. Thus, the Washington producers have suffered loss of that sum plus the loss of business, which loss is well in excess of the $10,000 jurisdictional amount. Also, it is interesting to note that in *Florida Avocado Growers v. Paul*, 373 U.S. 132, 157 (1963), this Court found that "* * * it was conceded that the Florida growers had suffered damage in the amount of $1,500 by reason of the enforcement of the stat-

tute * * *" and did not attempt to allocate those losses to individual growers.

The record clearly establishes that the appellee Washington State Apple Advertising Commission expends at least $25,000 annually in the State of North Carolina in carrying out its responsibilities to promote and protect apple markets for Washington apples. The commission's interest which is affected by the statute is clearly in excess of the $10,000 jurisdictional amount. 28 USC § 1331.

In cases where there is no adequate remedy at law, the measure of the Federal question jurisdiction is the value of the right sought to be protected by injunctive relief. *Spock vs. David*, 469 F. 2d 1047 (1972); *Scherr vs. Volpee*, 466 F. 2d 1027 (1971); *Dodge vs. Nakai*, 298 F. Supp. 17 (1968).

There is a presumption that the amount in controversy claimed by the plaintiff as the worth of the right to be protected is correct and sufficient and dismissal for lack of the jurisdictional amount will only be given where there is legal certainty that it is less than $10,000.00 *Cortright vs. Resor*, 325 F. Supp. 797 (1971). In the *Cortright* case, the Plaintiffs were challenging the right of the Secretary of the Army to reassign members of the U.S. Army band for the purpose of halting public expressions of disagreement with the Vietnam war, the Plaintiffs implying that such actions violated their right of free speech. The Court said:

> Plaintiffs are alleging one of the most cherished

> constitutional rights—freedom of speech. There is an increasing reluctance to dispose of such Federal constitutional issues on jurisdictional grounds. In recent cases, the Supreme Court has tended to ignore lack of 1331 jurisdictional amount as a basis for dismissal. See *Breen vs. Selective Service Local Board No. 16*, 396 U.S. 60, 90 S. Ct. 661, 24 L ed. 2d 653 (1970) (citing other cases). * * *

The *Cortright* case was later overturned but on other grounds. See *Cortright vs. Resor*, 447 F. 2d 245 (1971).

The Washington Apple Growers, as represented by the Washington Apple Commission, have a clear right to have their apples graded according to Washington State grades. These grades, as a matter of fact are adopted only after input from and deliberation by the Apple Commission. When the Washington grades are placed upon a box of apples, it is not only the apple grower himself speaking but also the Washington Apple Commission and the whole industry. The industry and the individual growers have a right to free speech and the freedom to disseminate information concerning the apples which they are shipping. "(T)he constitutional right of liberty of press is enjoyed not only by individuals, but also by associations of individuals, such as labor unions, and through the constitutional guarantee of due process, by corporations." *Bowe et al. v. Secretary of the Commonwealth*, 69 N.E. 2d 115 (1946).

CONCLUSION

North Carolina Gen. Stat. § 106-189.1 demonstrably conflicts with the United States Constitution in that it is violative of the Interstate Commerce Clause, the Fourteenth Amendment, Due Process and Equal Protection Clauses, and the First Amendment guarantee of freedom of speech and expression. The statute in question does not serve to protect the North Carolina citizens from deception or any health hazard, and consequently is not grounded on any valid public purpose. It is respectfully submitted that this Court should affirm the judgment of the three-judge federal district court which has enjoined the enforcement of that provision of North Carolina General Statute 106-189.1 which prevents the display of Washington State apples grades on shipping containers transmitted into the State of North Carolina.

DATED this 17th day of December, 1976.

Respectfully submitted,

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I hereby certify that on this 17th day of December, 1976, three copies of the Brief of Appellee were mailed, postage paid, to Rufus L. Edmisten, Attorney General of the State of North Carolina, N.C. Department of Justice, P. O. Box 629, Raleigh, North Carolina 27602 and to John R. Jordan, Jr., P. O. Box 709, Raleigh, North Carolina 27602, counsel for appellants. I further certify that all parties required to be served have been served.

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